No. 16-1362	
Title:	**Encino Motorcars, LLC, Petitioner** **v.** **Hector Navarro, et al.**
Docketed:	May 12, 2017
Linked with 16A940	
Lower Ct:	United States Court of Appeals for the Ninth Circuit
Case Numbers:	(13-55323)
Decision Date:	January 9, 2016
Questions Presented	

DATE	PROCEEDINGS AND ORDERS
Mar 30 2017	Application (16A940) to extend the time to file a petition for a writ of certiorari from April 9, 2017 to May 10, 2017, submitted to Justice Kennedy.
Apr 03 2017	Application (16A940) granted by Justice Kennedy extending the time to file until May 10, 2017.
May 10 2017	Petition for a writ of certiorari filed. (Response due June 12, 2017)
May 19 2017	Order extending time to file response to petition to and including July 24, 2017.
Jun 12 2017	Brief amici curiae of National Automobile Dealers Association, et al. filed.
Jul 21 2017	Brief of respondents Hector Navarro, et al. in opposition filed.
Aug 09 2017	DISTRIBUTED for Conference of 9/25/2017.
Aug 09 2017	Reply of petitioner Encino Motorcars, LLC filed. (Distributed)
Sep 28 2017	Petition GRANTED.
Oct 26 2017	Blanket Consent filed by Petitioner, Encino Motorcars, LLC
Oct 26 2017	Blanket Consent filed by Respondents, Hector Navarro, et al.

Nov 01 2017	Joint appendix filed.
Nov 01 2017	Brief of petitioner Encino Motorcars, LLC filed.
Nov 08 2017	Brief amici curiae of Chamber of Commerce of the United States of America, et al. filed.
Nov 08 2017	Brief amici curiae of National Automobile Dealers Association and State Automobile Dealers Associations for Alaska, et al. filed.
Nov 08 2017	The time to file respondents' brief on the merits is extended to and including December 8, 2017.
Nov 17 2017	SET FOR ARGUMENT ON Wednesday, January 17, 2018
Nov 22 2017	CIRCULATED.
Dec 07 2017	Brief amicus curiae of National Employment Lawyers Association filed. (Distributed) **Main Document** **Proof of Service** **Certificate of Word Count**
Dec 07 2017	Brief amicus curiae of International Association of Machinists and Aerospace Workers, AFL-CIO filed. (Distributed) **Main Document** **Certificate of Word Count** **Proof of Service**
Dec 08 2017	Brief amici curiae of Law Professors James Brudney, et al. filed. (Distributed) **Main Document** **Certificate of Word Count** **Proof of Service**
Dec 08 2017	Brief of respondents Hector Navarro, et al. filed. (Distributed) **Main Document** **Certificate of Word Count** **Proof of Service**
Dec 15 2017	Brief amici curiae of U.S. SENATORS PATTY MURRAY, SHERROD BROWN, AND JACK REED filed. (Distributed) **Main Document** **Certificate of Word Count** **Proof of Service**
Dec 18 2017	Record requested from the U.S.C.A. 9th Circuit.
Dec 19 2017	The record for the U.S.C.A. is electronic and located on PACER.
Jan 08 2018	Reply of petitioner Encino Motorcars, LLC filed. (Distributed) **Main Document** **Certificate of Word Count** **Proof of Service**

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16-1362

Supreme Court, U.S.
FILED
MAY 10 2017
OFFICE OF THE CLERK

No. _____

In the
Supreme Court of the United States

ENCINO MOTORCARS, LLC,

Petitioner,

v.

HECTOR NAVARRO, MIKE SHIRINIAN, ANTHONY PINKINS, KEVIN MALONE, REUBEN CASTRO,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Respondents are "service advisors" at a car dealership whose primary job responsibilities involve identifying service needs and selling service solutions to the dealership's customers. Respondents brought suit against the dealership under the Fair Labor Standards Act ("FLSA"), 29 U.S.C. §§201-219, seeking time-and-a-half overtime pay for working more than 40 hours per week.

The FLSA exempts from its overtime requirements "any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles." *Id.* §213(b)(10)(A). In its first decision in this case, the Ninth Circuit found Respondents non-exempt by deferring to a 2011 Department of Labor regulation. This Court granted certiorari, considered merits briefing and argument, and vacated that decision, holding that "§213(b)(10)(A) must be construed without placing controlling weight on the Department's 2011 regulation." Pet.App.44.

On remand, the Ninth Circuit once again found Respondents non-exempt. As it had in its initial vacated decision, the Ninth Circuit acknowledged that its holding conflicts with published decisions of the Fourth and Fifth Circuits, several district courts, and the Supreme Court of Montana, all of which hold that service advisors are exempt. Pet.App.30, 65.

As it was last time around, the question presented is: Whether service advisors at car dealerships are exempt under 29 U.S.C. §213(b)(10)(A) from the FLSA's overtime-pay requirements.

PARTIES TO THE PROCEEDING

Petitioner Encino Motorcars, LLC, was defendant in the district court and appellee in the Ninth Circuit. Respondents Hector Navarro, Anthony Pinkins, Kevin Malone, and Reuben Castro were plaintiffs in the district court and appellants in the Ninth Circuit.

CORPORATE DISCLOSURE STATEMENT

Encino Motorcars, LLC is a limited liability corporation doing business as Mercedes Benz of Encino. It has no parent corporation and no publicly held corporation owns 10% or more of its stock.

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PETITION FOR WRIT OF CERTIORARI

This petition presents, for the second time, the question whether "service advisors" at car dealerships are exempt from the mandatory-overtime requirements of the Fair Labor Standards Act ("FLSA"). Respondents are service advisors whose primary job responsibilities include identifying service needs and selling service solutions to the dealership's customers. Their duties include "listening to [customers'] concerns about their cars; suggesting repair and maintenance services; selling new accessories or replacement parts; [and] recording service orders." Pet.App.32. Service advisors are an integral part of the servicing process and are the salesmen dedicated to the servicing business at their dealerships.

The FLSA, 29 U.S.C. §§201-219, exempts from its overtime-pay requirements "any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles." *Id.* §213(b)(10)(A). For more than 40 years, federal and state courts across the country had uniformly held that service advisors like Respondents were covered by §213(b)(10)(A)'s exemption because they are "salesm[e]n ... engaged in ... servicing automobiles." *See, e.g.*, *Walton v. Greenbrier Ford*, 370 F.3d 446 (4th Cir. 2004); *Brennan v. Deel Motors*, 475 F.2d 1095 (5th Cir. 1973); *Thompson v. J.C. Billion, Inc.*, 294 P.3d 397 (Mont. 2013).

Relying on that unbroken line of precedent, the district court dismissed Respondents' complaint. Pet.App.76-85. But the Ninth Circuit reversed, deferring to the Department of Labor's ("DOL") narrow interpretation of §213(b)(10)(A) under which service advisors were not exempt because they did not *personally* sell or service automobiles. Pet.App.55-73.

This Court granted certiorari, considered merits briefing and argument, and vacated and remanded the Ninth Circuit's decision. Pet.App.31-45. The Court held that DOL's regulation was not entitled to deference because the agency had changed its previous policy regarding service advisors without "reasoned explanation." Pet.App.43. In particular, the Court emphasized that DOL had provided "barely any explanation" for its change of policy and had utterly failed to consider "decades of industry reliance on [DOL's] prior policy." Pet.App.42. The Court remanded the case to the Ninth Circuit with instructions to construe the exemption in §213(b)(10)(A) "without placing controlling weight on [DOL's] 2011 regulation." Pet.App.44. In addition, two Justices would have definitively construed the statute to hold service advisors exempt. *See* Pet.App.49-54 (Thomas, J., dissenting).

On remand, the same panel of the Ninth Circuit reached the same conclusion for largely the same reasons. Pet.App.1-30. While acknowledging that service advisors came within the "literal" terms of the exemption, the Ninth Circuit found them non-exempt for "the reasons stated in [its] earlier opinion (except those reasons concerning deference to the agency)." Pet.App.30. Just as it had done in its previous decision, the Ninth Circuit relied heavily on a purported canon of construction under which exemptions to the FLSA must be interpreted "narrowly" rather than being interpreted in accordance with their plain or literal text. Pet.App.20-

21. The court explicitly acknowledged that its decision "conflicts with published decisions by the Fourth and Fifth Circuits and by the Supreme Court of Montana." Pet.App.30.

* * *

Certiorari is plainly warranted to resolve the ongoing circuit conflict over whether service advisors are exempt under §213(b)(10)(A). Indeed, Respondents' principal (albeit unsuccessful) argument against certiorari the last time around was that DOL's 2011 regulation was a game-changer that was not available to the Fourth and Fifth Circuits, and thus the "courts are not divided on whether DOL's 2011 legislative regulation warrants *Chevron* deference." Br. in Opp. at 10, *Encino Motorcars v. Navarro*, No. 15-415 (Dec. 4, 2015) ("BIO"). Now that the 2011 DOL regulation and issues of deference are off the table, no one can seriously dispute what the Ninth Circuit has twice expressly acknowledged: the decision below squarely conflicts with the decisions of several other circuit courts, state supreme courts, and federal district courts.

It is unsurprising that the Ninth Circuit's interpretation of §213(b)(10)(A) is an outlier, as it badly misconstrues the statutory text. Congress' use of the disjunctive "or" in the phrase "primarily engaged in selling or servicing automobiles" makes clear that a salesman is exempt if he is "engaged in" *either* of those activities, which a service advisor plainly is. Every other court to consider this issue has correctly recognized that the phrase "primarily engaged in ... servicing automobiles" encompasses service advisors who are engaged in the selling of the servicing of automobiles even though they do not go under the hood and *personally* perform the service.

The Ninth Circuit's departure from nearly four decades of precedent injects uncertainty into a previously settled area of the law, and will have serious consequences for the nation's 18,000 car and truck dealerships, which collectively employ tens of thousands of service advisors. As this Court observed, "[d]ealerships and service advisors negotiated and structured their compensation plans against [the] background understanding" that service advisors were exempt from FLSA overtime rules. Pet.App.42. If allowed to stand, the Ninth Circuit's decision would require a wholesale (and wholly unwarranted) restructuring of those employees' compensation, forcing dealerships to divide their salesforces into exempt and non-exempt categories in ways that are both divisive and contrary to Congress' plain intent.

This Court has repeatedly rejected attempts to impose significant FLSA liability on employers who have done nothing more than pay workers in conformity with long-settled industry practice. *See, e.g.*, *Integrity Staffing Sols. v. Busk*, 135 S. Ct. 513 (2014) (rejecting novel FLSA claims for time spent in security screenings); *Christopher v. SmithKline Beecham*, 567 U.S. 142 (2012) (rejecting FLSA claims by pharmaceutical sales representatives, who had long been treated as exempt); *see also Yi v. Sterling Collision Ctrs.*, 480 F.3d 505, 510 (7th Cir. 2007) (rejecting novel FLSA challenge to a "system of compensation [that] ... is industry-wide, and of long standing"). The attempt here should fare no better. This Court should grant certiorari to correct the Ninth

Circuit's deeply flawed interpretation of §213(b)(10)(A) and restore uniformity once and for all to this important area of the law.

OPINIONS BELOW

The Ninth Circuit's opinion on remand is reported at 845 F.3d 925 and reproduced at Pet.App.1-30. The Court's previous merits opinion in this case is reported at 136 S. Ct. 2117 and reproduced at Pet.App.31-54. The Ninth Circuit's initial decision is reported at 780 F.3d 1267 and reproduced at Pet.App.55-73. The district court's opinion is unpublished and is reproduced at Pet.App.76-85.

JURISDICTION

The Ninth Circuit issued its opinion on remand on January 9, 2017. On April 3, 2017, Justice Kennedy extended the time for filing this petition to May 10, 2017. *See* No. 16A9. This Court has jurisdiction under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant provisions of the FLSA, 29 U.S.C. §213, are reproduced at Pet.App.86-110.

STATEMENT OF THE CASE

A. The "Salesman, Partsman, or Mechanic" Exemption and DOL's Shifting Interpretations

1. The FLSA generally requires employers to pay overtime compensation at a rate of one-and-a-half times an employee's regular rate of pay for all hours worked in excess of forty in a week. 29 U.S.C. §207(a)(1). Accompanying these overtime-pay requirements are numerous exemptions for certain

types of employees. *See id.* §213(a), (b). The exemptions range from very broad (all employees of certain rail carriers and air carriers, *id.* §213(b)(2), (3)) to very narrow (employees "engaged in the processing of maple sap into sugar," *id.* §213(b)(15)).

As relevant here, the FLSA provides that the overtime-pay requirements do not apply to "any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles, trucks, or farm implements, if he is employed by a nonmanufacturing establishment primarily engaged in the business of selling such vehicles or implements to ultimate purchasers." *Id.* §213(b)(10)(A); *see* Pub. L. No. 89-601, 80 Stat. 830 (1966). In other words, a dealership employee is exempt from the overtime rules if he: (1) is a "salesman, partsman, or mechanic," and (2) is "primarily engaged in selling or servicing automobiles."

2. In 1970, the Secretary of Labor promulgated interpretive regulations that sought to define several terms in §213(b)(10)(A). *See* 29 C.F.R. §779.372 (1971); 35 Fed. Reg. 5856, 5895-96 (Apr. 9, 1970). Those regulations defined "salesman" as "an employee who is employed for the purpose of and is primarily engaged in making sales or obtaining orders or contracts for sale of [vehicles]." 29 C.F.R. §779.372(c)(1) (1971).[1] DOL further asserted that

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[1] The regulation defined a "partsman" as "any employee employed for the purpose of and primarily engaged in requisitioning, stocking, and dispensing parts." 29 C.F.R. §779.372(c)(2) (1971). It also defined a "mechanic" as "any employee primarily engaged in doing mechanical work ... in the

"[e]mployees variously described as service manager, service writer, service advisor, or service salesman who are not themselves primarily engaged in the work of a salesman, partsman, or mechanic ... are not exempt." *Id.* §779.372(c)(4). DOL believed that service advisors should be deemed non-exempt even though "such an employee's principal function may be diagnosing the mechanical condition of vehicles brought in for repair, writing up work orders for repairs authorized by the customer, assigning the work to various employees and directing and checking on the work of mechanics." *Id.*

In the years after DOL promulgated this interpretive regulation, numerous courts uniformly rejected the agency's narrow interpretation of the exemption in the course of rejecting DOL enforcement actions. Most significantly, the Fifth Circuit flatly rejected DOL's position and held that service advisors were exempt. *See Deel Motors*, 475 F.2d at 1097-98. DOL had advanced the narrow interpretation of the exemption set forth in its 1970 regulation, arguing that service advisors should not be exempt because they do not *personally* service vehicles. The Fifth Circuit rejected that view based on both the text and purpose of the exemption.

As a textual matter, the court concluded that service advisors were plainly "salesm[e]n ... engaged in selling or servicing automobiles." *Id.* at 1098. And, with regard to the purpose of the exemption, the Fifth Circuit noted that "service salesmen are functionally

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servicing of an automobile, trailer, truck, farm implement, or aircraft for its use and operation as such." *Id.* §779.372(c)(3).

similar to the mechanics and partsmen who service the automobiles." *Id.* at 1097. All of these employees "work as an integrated unit, performing the services necessary for the maintenance of the customer's automobile." *Id.* And like countless other salesmen who are exempt from FLSA's overtime rules, service advisors "are more concerned with their total work product than with the hours performed." *Id.* The Fifth Circuit thus concluded that service advisors were exempt under §213(b)(10)(A).[2]

3. Within a few years of the Fifth Circuit's decision in *Deel Motors,* DOL ceased bringing enforcement actions and retreated from the position advanced in its interpretive regulations. In 1978, the Secretary of Labor issued a policy letter changing the agency's position and providing that service advisors should be treated as exempt as long as a majority of their sales were for non-warranty work. *See* U.S. Dep't of Labor, Wage & Hour Div., Opinion Letter on Fair Labor Standards Act, 1978 WL 51403 (July 28, 1978) (acknowledging that "[t]his position represents a change from the position set forth in" the 1970 regulations).

DOL's 1987 Field Operations Handbook similarly instructed agency employees to "no longer deny the [overtime] exemption for [service advisors]." Dep't of

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[2] In 1974, one year after the decision in *Deel Motors,* Congress made other changes to the §213(b)(10)(A) exemption by, for example, narrowing the exemption for trailer, boat, and aircraft dealerships. *See* Pub. L. No. 93-259, §14, 88 Stat. 55, 65 (1974). But, notably, Congress did not make any comparable changes for other types of dealerships, nor did it purport to modify or override the Fifth Circuit's interpretation of the statute in *Deel Motors.*

Labor, Wage & Hour Div., Field Operations Handbook, Insert No. 1757, 24L04-4 (Oct. 20, 1987), *available at* perma.cc/5ghd-kcjj. The Handbook explained that "two appellate courts (Fifth and Sixth Circuits) and two district courts (in the Eighth and Tenth Circuits)" have construed the exemption to cover service advisors. *Id.*[3] The Handbook acknowledged that "this policy ... represents a change from the position in [the 1970 regulations]," and indicated that the agency's regulations "will be revised as soon as is practicable." *Id.*

"[A]s soon as is practicable" turned out to be not very soon. The 1970 interpretive regulations with their repudiated interpretation of §213(b)(10)(A) remained on the books until 2008, when DOL initiated a formal rulemaking process to update the regulations to confirm that service advisors are exempt from the overtime-pay requirements. *See* Updating Regulations Issued Under the FLSA, 73 Fed. Reg. 43,654 (July 28, 2008). As DOL explained, "[u]niform appellate and district court decisions ... hold that service advisors are exempt under [29 U.S.C. §213(b)(10)(A)] because they are 'salesmen' who are primarily engaged in 'servicing' automobiles." *Id.* at 43,658 (citing *Walton*, 370 F.3d at 452; *Deel Motors*, 475 F.2d at 1097; *Brennan*, 1975 WL 1074, at *3). DOL's notice of proposed rulemaking included a modified version of 29 C.F.R. §779.372(c)(4) that would have codified this unbroken line of case law.

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[3] In addition to the Fifth Circuit's decision in *Deel Motors*, the Sixth Circuit had summarily affirmed a district court decision finding service advisors to be exempt under §213(b)(10)(A). *See Brennan v. N. Bros. Ford*, No. 40344, 1975 WL 1074, at *3 (E.D. Mich. 1975), *aff'd sub nom. Dunlop v. N. Bros. Ford*, 529 F.2d 524 (6th Cir. 1976) (Table).

In 2011, however, DOL changed course yet again. It issued a final rule that neither adopted the proposed regulation nor brought the regulation in line with the governing case law. *See* Updating Regulations Issued Under the FLSA, 76 Fed. Reg. 18,832, 18,859 (Apr. 5, 2011). DOL maintained the 1970 regulation's definition of "salesman," *see* 29 C.F.R. §779.372(c)(1), but simultaneously eliminated from its regulations any explicit discussion of whether service advisors were covered by the §213(b)(10)(A) exemption, *see* 76 Fed. Reg. at 18,859.[4] In its explanation accompanying the final rule, DOL said nothing at all about the substantial reliance interests the new rule would upset. Instead, it merely stated that service advisors should not be treated as exempt because the regulatory definitions "limit[] the exemption to salesmen who sell vehicles and partsmen and mechanics who service vehicles." *Id.* at 18,838.

B. Respondents' Complaint and the District Court's Decision

Petitioner Encino Motorcars, LLC, sells and services new and used Mercedes Benz automobiles. Respondents are current and former employees of Petitioner who worked at the dealership as "service advisors." On September 18, 2012, Respondents filed a complaint alleging several violations of the FLSA and California Labor Code.

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[4] At oral argument before this Court, counsel for the United States represented that the elimination of any reference to service advisors in the regulations represented "an inadvertent mistake in drafting." Tr. of Oral Arg. at 50, *Encino Motorcars LLC v. Navarro*, 136 S. Ct. 2117 (2016) (No. 15-415).

Respondents' sales activities were integral to the process of servicing vehicles at the dealership. The complaint alleges that, as service advisors, Respondents would meet and greet car owners as they entered the service area; evaluate the customers' service and repair needs; suggest services to be performed on the vehicle to address the customers' complaints; solicit supplemental services to be performed (such as preventive maintenance); prepare price estimates for repairs and services; and inform the owner about the status of the vehicle. *See* Complaint ¶16 (DN 2). And, like countless other salesmen in both vehicle dealerships and other industries, Respondents were paid by commission. *Id.* ¶¶18-19.[5] The more services an advisor sold, the higher his or her commission. *Id.* In short, Respondents were primarily engaged in selling the servicing of automobiles.

Respondents alleged that they often worked more than 40 hours per week, and that Petitioner violated the FLSA by failing to pay them time-and-one-half overtime compensation for that excess time. *Id.* ¶¶24-31. Petitioner moved to dismiss the FLSA claims on the ground that Respondents were exempt employees under 29 U.S.C. §213(b)(10)(A).

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[5] Some dealerships pay their service advisors a combination of salary or hourly wages and commissions, whereas other dealerships (like Petitioner) pay service advisors solely by commission.

On January 25, 2013, the district court granted Petitioner's motion to dismiss the FLSA claims, holding that Respondents were clearly covered by the overtime-pay exemption in §213(b)(10)(A). Pet.App.76-85. The district court began by noting that several other courts "have applied this exemption to Service Advisors." Pet.App.80 (citing *Deel Motors*, 475 F.2d at 1097; *Walton*, 370 F.3d at 453).

The district court acknowledged that DOL had stated in 1970 and again in 2011 that §213(b)(10)(A) did not apply to service advisors. *Id.* But the court refused to defer to those interpretations, agreeing with the Fourth and Fifth Circuits that DOL's interpretations were an "impermissibly restrictive construction of the statute." Pet.App.83 (quoting *Walton*, 370 F.3d at 452). Because "Service Advisors ... are *functionally equivalent* to salesmen and mechanics and are similarly responsible for the 'selling and servicing' of automobiles," the district court concluded that it would be "unreasonable" to carve those employees out of the exemption. *Id.* (emphasis added). The court did not believe that "Congress intended to treat employees with functionally similar positions differently." *Id.* (quoting *Deel Motors*, 475 F.2d at 1097-98). The district court thus dismissed Respondents' claim for overtime under the FLSA on the ground that they were exempt under §213(b)(10)(A).[6]

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[6] After dismissing the FLSA claims, the district court declined to exercise supplemental jurisdiction over Respondents' remaining state-law claims.

C. The Ninth Circuit's Initial Decision

The Ninth Circuit reversed in relevant part. In an opinion by Judge Graber issued on March 24, 2015, the court held that service advisors are not exempt from the FLSA's overtime-pay requirements under §213(b)(10)(A). Pet.App.55-73.

The panel relied heavily on the purported canon of construction that "[t]he FLSA is to be construed liberally in favor of employees" and "exemptions are narrowly construed against employers." Pet.App.60 (quoting *Haro v. City of Los Angeles*, 745 F.3d 1249, 1256 (9th Cir. 2014)). Because the statute does not define "salesman, partsman, or mechanic," and does not explicitly mention "service advisors," the Ninth Circuit could not "conclude that service advisors ... are 'persons plainly and unmistakably within [the FLSA's] terms and spirit.'" Pet.App.61 (quoting *Solis v. Washington*, 656 F.3d 1079, 1083 (9th Cir. 2011)).

The Ninth Circuit also disagreed with the district court's refusal to give DOL deference. The Ninth Circuit believed that there were two "plausible" interpretations of the phrase "any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles"—one that extends to service advisors, and one that does not—and thus concluded that the exemption is ambiguous under *Chevron* step one. Pet.App.60-65. Turning to *Chevron*'s second step, the Ninth Circuit concluded that it was reasonable for DOL to interpret the exemption so that salesmen are exempt if they are "engaged in selling ... automobiles," but not if they (like service advisors) are "engaged in ... servicing automobiles." Pet.App.65-73.

The Ninth Circuit acknowledged that its holding "conflicts with decisions of the Fourth and Fifth Circuits, several district courts, and the Supreme Court of Montana." Pet.App.65-66 (citing *Walton*, 370 F.3d 446; *Deel Motors*, 475 F.2d 1095; *Thompson*, 294 P.3d 397). But the court "respectfully disagree[d] with those decisions." Pet.App.66. The Ninth Circuit thus held that Respondents were not exempt under 29 U.S.C. §213(b)(10)(A) and reversed the district court's dismissal of Respondents' claims.[7]

D. This Court's Merits Decision

This Court granted certiorari in January 2016, and—after merits briefing and oral argument—vacated the Ninth Circuit's decision in an opinion issued on June 20, 2016. Pet.App.31-54. The Court did not directly address whether service advisors were exempt under the plain text of §213(b)(10)(A). Instead, the Court held that the Ninth Circuit erred by "placing controlling weight on the Department's 2011 regulation." Pet.App.44. As the Court explained, even though DOL's regulation starkly departed from more than three decades of settled law, the agency "said almost nothing" about why it had made that change. Pet.App.43. In particular, the agency wholly disregarded "decades of industry reliance on the Department's prior policy," and the fact that

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[7] The Ninth Circuit affirmed the district court's dismissal of the other federal claims because Respondents failed to challenge the alternative grounds on which those claims were dismissed. *See* Pet.App.58 n.2. And because it reinstated Respondents' federal overtime-pay claim, the Ninth Circuit vacated the district court's dismissal of Respondents' state-law claims for lack of jurisdiction. *See id.*

"[d]ealerships and service advisors negotiated and structured their compensation plans against this background understanding" of what the law means. Pet.App.42.

The Court thus vacated the Ninth Circuit's decision and remanded for further consideration of the issue "without placing controlling weight on the Department's 2011 regulation." Pet.App.44. Justices Thomas and Alito agreed that no deference was owed to the DOL regulation but dissented from the decision to remand. They would have held that "service advisors are salesmen primarily engaged in the selling of services for automobiles" and thus fall within the plain text of the exemption in §213(b)(10)(A). Pet.App.49.

E. The Ninth Circuit on Remand Again Departs From Every Other Court To Consider The Scope of §213(b)(10)(A)

On remand, the Ninth Circuit again held that §213(b)(10)(A)'s exemption does not apply to service advisors. Pet.App.1-30.[8]

The Ninth Circuit conceded that, "read literally," the exemption "encompasses" a category of employee that readily describes service advisors: "Salesm[e]n primarily engaged in servicing" cars. Pet.App.16-18. The court nonetheless rejected that "literal" reading of the statute. First, relying on dictionaries from the year of the provision's initial enactment, the court read §213(b)(10)(A)—which exempts "any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles"—to exempt *only* those salesmen, partsmen, and mechanics who either "are actually and primarily occupied in selling cars" or "are actually and primarily occupied in the repair and maintenance of cars." Pet.App.15. The court further interpreted that "actually and primarily occupied in" requirement—which does not appear in the statutory text—to mean that a salesman, partsman, or mechanic must *personally* sell cars or *personally* "perform[] any repairs []or provide[] any maintenance" in order to be exempt under §213(b)(10)(A). Pet.App.12-15.

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[8] The court "assume[d] without deciding that [it] must give no weight to the agency's interpretation and the regulation," and was instead required to "'interpret the statute in the first instance.'" Pet.App.7 (quoting Pet.App.44-45).

The Ninth Circuit also concluded that the "literal" reading of the statute produced results that Congress would not have intended. "Read literally," §213(b)(10)(A) encompasses six categories of employees—(1) salesmen, (2) partsmen, and (3) mechanics primarily engaged in selling cars; and (4) salesmen, (5) partsmen, and (6) mechanics primarily engaged in servicing cars—two of which (categories 2 and 3) "do not exist in the real world." Pet.App.16-17. The court thus concluded that Congress must have intended for "the gerunds—selling and servicing—to be distributed" only to those subjects the court deemed "appropriate." Pet.App.16-18.

The court believed that the legislative history confirmed its reading of the exemption. According to the Ninth Circuit, both the 1966 Congress and 1974 Congress understood the term "salesman" to refer "*only* to [employees] 'selling' *goods*," not services. Pet.App.27 (second emphasis added); *see* Pet.App.23

n.17. The court also found no relevant "references to service advisors" in the legislative history, "suggest[ing] that dealerships had no concern about overtime compensation for service advisors." Pet.App.25.

Finally, just as in its first opinion, the Ninth Circuit relied on the purported "rule that the exemptions in §213 of the FLSA 'are to be narrowly construed against the employers seeking to assert them.'" Pet.App.20 (quoting *Arnold v. Ben Kanowsky, Inc.*, 361 U.S. 388, 392 (1960)). While acknowledging that "some members of the Supreme Court have questioned the soundness of the rule of narrow construction," the court deemed itself bound to reject Petitioner's textual interpretation in light of the atextual narrow-interpretation canon of construction. Pet.App.20-21.

The Ninth Circuit thus reaffirmed its initial holding that §213(b)(10)(A) does not apply to service advisors. The court readily admitted that its decision "conflicts with published decisions by the Fourth and Fifth Circuits and by the Supreme Court of Montana." Pet.App.30. The court brushed aside that unbroken string of authority, however, "for the reasons stated above and for the reasons stated in [its] earlier opinion (except those reasons concerning deference to the agency)." *Id.*

REASONS FOR GRANTING THE PETITION

Even more obviously than the last time around (now that any issue of deference to the 2011 regulation is off the table), this case presents an excellent vehicle for this Court to resolve an acknowledged split of authority over whether the tens of thousands of "service advisors" who work at vehicle dealerships across the country are exempt from the FLSA's overtime-pay requirements. The Court should once again grant certiorari to resolve the exempt status of service advisors.

I. Despite being afforded a second chance to harmonize its law with all other published authority, the Ninth Circuit doubled down on its outlying conclusion that service advisors are not exempt from the FLSA's overtime-pay requirements. As it did in its previous decision, the Ninth Circuit acknowledged that its interpretation of §213(b)(10)(A) conflicts with *every other court* to consider the issue, including the Fourth and Fifth Circuits, several district courts, and the Supreme Court of Montana. Pet.App.30, 65.

That the Ninth Circuit's decision is an outlier should come as no surprise, since the court below badly misconstrued §213(b)(10)(A). As even the Ninth Circuit acknowledged, the literal text of the exemption applies to service advisors, who are unquestionably "salesm[e]n ... primarily engaged in ... servicing automobiles." Service advisors are salesmen primarily engaged in *selling the servicing* of automobiles, and they certainly are not primarily engaged in anything *other* than selling or servicing automobiles. Having first evaded the literal text by a misguided invocation of deference, the Ninth Circuit's latest effort to escape the literal text by reliance on a mishmash of legislative history and purported canons of narrow construction fares no better, and certainly cries out for this Court's review.

II. The Ninth Circuit's erroneous interpretation of §213(b)(10)(A) will have far-reaching implications for the nation's 18,000 franchised car and truck dealerships, which employ tens of thousands of service advisors. As this Court has already recognized, "[d]ealerships and service advisors negotiated and structured their compensation plans against this background understanding" that service advisors were exempt from the FLSA's overtime rules. Pet.App.42. Yet the Ninth Circuit's decision would require a wholesale reworking of the service advisor position, to the detriment of dealerships and employees alike. Moreover, by injecting into the statute an artificial requirement that a service advisor *personally* service automobiles, the decision below improperly calls into question the exempt status of partsmen, many of whom do not personally service automobiles.

Lack of uniformity is especially troubling in the FLSA context because of the availability of nationwide FLSA collective actions. Because plaintiffs may file collective action claims in the most plaintiff-friendly forum, the Ninth Circuit's decision will likely become the *de facto* nationwide rule for any dealership that has operations within the Ninth Circuit. Certiorari is plainly warranted to restore national uniformity to this important area of the law.

I. The Ninth Circuit's Decision Conflicts With The Decisions Of Several Other Courts And Is Wrong On The Merits.

A. The Ninth Circuit's Decision Openly Conflicts With Decisions of the Fourth and Fifth Circuits and the Montana Supreme Court.

Despite being granted a second chance by this Court to eliminate an acknowledged circuit split, the Ninth Circuit dug in and entrenched the split by again holding that service advisors are not exempt from the FLSA's overtime-pay requirements. Just as in its initial opinion, Pet.App.65, the Ninth Circuit acknowledged in its post-remand opinion that its interpretation of §213(b)(10)(A) "conflicts with published decisions by the Fourth and Fifth Circuits and by the Supreme Court of Montana." Pet.App.30. But unlike its first opinion, which relied on DOL's 2011 regulation, which was not available to the Fourth and Fifth Circuits, the Ninth Circuit's latest decision unambiguously parts company with the statutory analysis of every other court to consider the issue. *See id.* There is no serious dispute that the lower courts are squarely divided over the meaning of §213(b)(10)(A).

1. In *Walton v. Greenbrier Ford*, 370 F.3d 446, the Fourth Circuit held that service advisors fall within the plain text of the FLSA's overtime-pay exemption. The ***Walton*** plaintiff's job duties were identical to Respondents' job duties here: he would "greet customers, listen to their concerns about their cars, write repair orders, follow-up on repairs, ... keep customers informed about maintenance[,] [and]

suggest to customers additional services that needed to be p[er]formed." *Id.* at 449.

Under the plain text of §213(b)(10)(A), the Fourth Circuit concluded that service advisors were "salesm[e]n ... primarily engaged in servicing automobiles." *Id.* at 453. Service advisors are an "integral part of the dealership's servicing of automobiles" because they are the "first line ... service sales representative[s]." *Id.* at 452-53. Their role was to figure out what services the customer needed, prepare cost estimates, and sell both necessary repair services and supplemental services. *Id.* at 452. The court thus concluded that those employees were salesmen "primarily engaged in servicing automobiles." *Id.* at 453.

The Fourth Circuit also held that DOL's interpretation of the exemption in its 1970 interpretive regulation was "unreasonable" because it is "an impermissibly restrictive construction of the statute." *Id.* at 452. Under DOL's view, a salesman would be covered by the exemption only if he were primarily engaged in *selling vehicles*. But, as the Fourth Circuit explained, that interpretation effectively ignores the second half of the disjunctive clause "selling *or servicing* automobiles." 29 U.S.C. §213(b)(10)(A) (emphasis added). The court refused to defer to DOL's "restrictive regulatory definition" because it "unreasonably implements the congressional mandate." 370 F.3d at 452.

Similarly, in *Deel Motors*, 475 F.2d 1095, in the course of rejecting one of DOL's early enforcement actions, the Fifth Circuit squarely held that service advisors were exempt from the FLSA. Under the plain text of the exemption, the court concluded that service advisors were "salesm[e]n ... engaged in selling or servicing automobiles." *Id.* at 1098. And the court further noted that "service salesmen are functionally similar to the mechanics and partsmen who service the automobiles." *Id.* at 1097. All of these employees "work as an integrated unit, performing the services necessary for the maintenance of the customer's automobile." *Id.* And, like countless other salesmen who are exempt from the FLSA's overtime rules, service advisors "are more concerned with their total work product than with the hours performed." *Id.* The Fifth Circuit thus had little difficulty concluding that service advisors were exempt under §213(b)(10)(A).

Several other courts have reached the same conclusion. In *Thompson*, 294 P.3d 397, the Montana Supreme Court agreed with the Fourth and Fifth Circuits that §213(b)(10)(A)'s exemption covers service advisors. *Id.* at 402. The court concluded that "[a] plain, grammatical reading of 29 U.S.C. §213(b)(10)(A) makes clear that the term 'salesman' encompasses a broader category of employees than those only engaged in selling vehicles." *Id.* The court added that "[t]he use of the disjunctive 'or' between the words 'selling *or* servicing' means that the exemption applies to any 'salesman, partsman, or mechanic,' who [is] primarily engaged in *either* of these duties." *Id.* (emphasis added).

The federal district courts that have addressed this issue have also uniformly concluded that the exemption in §213(b)(10)(A) applies to service advisors. *See, e.g.*, *Yenney v. Cass Cty. Motors*, No. 76-0-294, 1977 WL 1678 (D. Neb. Feb. 8, 1977); *Brennan* *v. N. Bros. Ford*, No. 40344, 1975 WL 1074 (E.D. Mich. Apr. 17, 1975), *aff'd sub nom. Dunlop v. N. Bros. Ford*, 529 F.2d 524 (6th Cir. 1976) (Table); *Brennan v. Import Volkswagen, Inc.*, No. W-4982, 1975 WL 1248 (D. Kan. Oct. 21, 1975). The district court here likewise held that service advisors were exempt. *See* Pet.App.76-85.

2. None of this was lost on the Ninth Circuit. It expressly acknowledged that its decision on remand "conflicts with" the decisions cited above. Pet.App.30. The Ninth Circuit had no choice but to acknowledge a split. Respondents perform the same job functions as the service advisors in the cases cited above, yet the Ninth Circuit (on "de novo review of congressional intent") found them to be non-exempt while every other court (on the basis of actual statutory text) has found them to be exempt. It is difficult to imagine a clearer example of "a decision in conflict with the decision of another United States court of appeals on the same important matter," and a decision that "conflicts with a decision by a state court of last resort." S. Ct. R. 10(a).

Indeed, when the case was last before this Court, Respondents' principal argument against plenary review was that there was no meaningful split of authority because the Fourth and Fifth Circuit decisions pre-dated DOL's 2011 regulation and did not apply the *Chevron* framework in analyzing the scope of §213(b)(10)(A). *See* BIO.10-11. But with both the 2011 regulation and questions of deference now off the table, there is simply no denying the existence of a square split of authority.

While a circuit split over the meaning of a federal statute would be undesirable under any circumstances, the need for a uniform rule in this context is particularly critical. The FLSA provides for nationwide collective actions "by any one or more employees for and in behalf of himself or themselves and other employees similarly situated." 29 U.S.C. §216(b). Because of the availability of nationwide FLSA collective actions, the most plaintiff-friendly jurisdiction will often be able to establish the *de facto* substantive law that governs many employers throughout the entire country.

Indeed, there are hundreds of vehicle dealerships that operate at locations both within and outside the Ninth Circuit. As a result, even though the Ninth Circuit is the only court to have ever found service advisors to be non-exempt, that jurisdiction will likely become a forum of choice for plaintiffs seeking to challenge the exempt status of service advisors. One way or the other, the scope of a critical federal labor statute should not turn on the happenstance of the state in which a company is operating. Certiorari is warranted to restore a nationally uniform interpretation of §213(b)(10)(A).

B. The Ninth Circuit Badly Misconstrued Section 213(b)(10)(A).

That the Ninth Circuit is the only court to have found service advisors non-exempt should be no surprise: the decision below is unmoored from both the text and purpose of §213(b)(10)(A).

1. The FLSA exempts from the overtime-pay requirements "any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles,

trucks, or farm implements, if he is employed by a nonmanufacturing establishment primarily engaged in the business of selling such vehicles or implements to ultimate purchasers." *Id.* §213(b)(10)(A). There is no dispute that Petitioner is "a nonmanufacturing establishment primarily engaged in the business of selling [automobiles] ... to ultimate purchasers." *Id.* The only question is whether each Respondent is a "salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles." *Id.* They plainly are, and the Ninth Circuit's reasons for holding otherwise do not withstand scrutiny.

A service advisor is the paradigmatic "salesman ... primarily engaged in ... servicing automobiles." According to Respondents' own complaint, their job duties included evaluating customers' service and repair needs; suggesting services to address specific problems with the vehicles; preparing cost estimates; and offering supplemental services such as preventative maintenance. *See* Complaint ¶16 (DN 2). In short, "service advisors are salesmen primarily engaged in the selling of services for automobiles." Pet.App.49 (Thomas, J., dissenting); *see also Walton*, 370 F.3d at 452-53 (service advisors exempt because they are an "integral part of the dealership's servicing of automobiles" and are the "first line ... service sales representative[s]"). They are thus exempt under a straightforward textual interpretation of §213(b)(10)(A). Indeed, even the Ninth Circuit was forced to concede that service advisors come within the "literal" text of the exemption. Pet.App.16.

2. In again resisting the conclusion suggested by the plain text, the Ninth Circuit concluded that despite the statute's disjunctive language—"any salesman, partsman, or mechanic primarily engaged in *selling or servicing* automobiles"—the exemption covers only salesmen who "are actually and primarily occupied in selling cars," and not salesmen "engaged in servicing" them. Pet.App.15, 19. That interpretation cannot be squared with the actual language of the statute.

The Ninth Circuit's interpretation flies in the face of the most basic rules of grammar and statutory construction. In interpreting a sentence with multiple disjunctive nouns and multiple disjunctive direct-object gerunds, each noun is linked to each gerund as long as that noun-gerund combination has a sensible meaning. *See, e.g., Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979) ("Canons of construction ordinarily suggest that terms connected by a disjunctive be given separate meanings, unless the context dictates otherwise ...."); *FCC v. Pacifica Found.*, 438 U.S. 726, 739-40 (1978) ("The words ... are written in the disjunctive, implying that each has a separate meaning."). Here, there is no question that the term "or" in the phrase "salesman ... primarily engaged in selling or servicing" is disjunctive and that both gerunds can sensibly be applied to the noun "salesman." Thus, *both* parts of the disjunctive phrase "engaged in selling or servicing automobiles" can plainly be applied to the noun "salesman." That interpretation is further confirmed by Congress' use of the word "any" before "salesman," which suggests an "expansive meaning." *United States v. Gonzales*, 520 U.S. 1, 5 (1997).

The Ninth Circuit itself acknowledged that, "[r]ead literally, the exemption encompasses ... [s]alesm[e]n primarily engaged in servicing" automobiles. Pet.App.16. Yet the court departed from that straightforward, textual reading because, in addition to encompassing service advisors, the "literal" reading of §213(b)(10)(A) would also extend to partsmen and mechanics primarily engaged in selling cars—jobs that, according to the court, "do not exist in the real world." Pet.App.17.

But the theoretical possibility of such practically non-existent combinations is no excuse for declining to extend the exemption to all the noun-gerund combinations that actually exist in the real world. In implementing an instruction to feed hungry or barking cats or dogs, the non-existence of barking cats is no justification for leaving a plainly famished, but mute, dog unfed. So too in statutory construction. Where a particular theoretical combination of disjunctive nouns and gerunds produces a practical null set (*e.g.*, "partsm[e]n [or] mechanic[s] primarily engaged in selling ... automobiles"), the null set, but not fundamental rules of grammar and statutory construction, can be safely ignored. Courts need not worry about the theoretical combinations because no case will raise the issue; partsmen and mechanics primarily engaged in selling cars "do not exist." Pet.App.17. But where, as here, the combinations are eminently sensible—*e.g.*, where a statutory combination reaches one of the tens of thousands of "salesm[e]n ... primarily engaged in ... servicing automobiles" currently at work in the United States—the "literal" reading must prevail. *See* Pet.App.52-53 (Thomas, J., dissenting) (rejecting Respondents' "distributive canon" argument that selling is done only by salesmen and servicing is only done by mechanics).

3. Treating service advisors as non-exempt also makes little sense in the broader scheme of the FLSA. The FLSA contains numerous provisions (in addition to §213(b)(10)(A)) that are designed to exclude from the mandatory overtime rules individuals who are engaged in sales or paid by commission. *See, e.g.*, 29 U.S.C. §207(*i*) (excluding certain employees of retail or service establishments who are paid commissions); *id.* §213(a)(1) (excluding "any employee employed ... in the capacity of outside salesman").

Those provisions reflect the basic reality that it is both common and reasonable for salesmen to be compensated based on their *success at selling*, rather than the sheer number of hours worked. As the Fifth Circuit has explained, "[t]he enactment of [§213(b)(10)(A)] was an implicit recognition by Congress of the incentive method of remuneration for salesmen, partsmen, and mechanics employed by an automobile dealership." *Deel Motors*, 475 F.2d at 1098. Like countless other salesmen who are treated as exempt under the FLSA, service advisors "are more concerned with their total work product than with the hours performed." *Id.* at 1097. Forcing an employer to pay service advisors—who are quintessential salesmen—overtime compensation on an hourly basis would be a misguided attempt to fit a square peg into a round hole, and would do nothing to promote the policies underlying the FLSA. *Cf. Christopher*, 567 U.S. at 166 (noting that pharmaceutical sales representatives "are hardly the kind of employees that the FLSA was intended to protect").

The Ninth Circuit's interpretation also forces dealerships to differentiate among their employees in ways that are contrary to Congress' plain intent. Service advisors are in some sense a hybrid, since their job is to sell, but rather than sell cars, they sell services. If the salesforce were entirely exempt and the service staff (such as mechanics and partsmen) were entirely non-exempt, then the Ninth Circuit's rejection of the statute's "literal" reading might be reasonable. But here the Ninth Circuit has seized on the fact that service advisors are a hybrid between two *fully exempt* categories ("salesm[e]n" "primarily engaged ... "servicing automobiles") as a ground for deeming them non-exempt. That interpretation is not just concededly atextual; it needlessly creates fissures among similar employees that Congress plainly did not intend.

None of the Ninth Circuit's various justifications for deviating from the statute's literal text holds water. As already demonstrated, the Ninth Circuit's textual analysis was flawed, and its policy concerns misplaced. *See supra* at 24-28. The Ninth Circuit also invoked legislative history to buttress its conclusion, Pet.App.22-30, but there is ample legislative history to the contrary, *see* Reply Br. for Pet'r at 16-20, *Encino Motorcars v. Navarro*, No. 15-415 (Apr. 13, 2016), and no justification for resorting to ambiguous legislative history to evade the literal text. *See Ratzlaf v. United States*, 510 U.S. 135, 147 (1994) ("[W]e do not resort to legislative history to cloud a statutory text that is clear."). The Ninth Circuit's final justification, the so-called canon favoring narrow interpretations of FLSA exemptions, is not only misguided, but a further justification for plenary review, as demonstrated next.

C. The Ninth Circuit Erred by Holding That FLSA Exemptions Should Be "Narrowly Construed."

The Ninth Circuit buttressed its untenable textual analysis by relying heavily on the purported canon of construction that "the exemptions in §213 of the FLSA 'are to be narrowly construed against the employers seeking to assert them.'" Pet.App.20 (quoting *Arnold*, 361 U.S. at 392). Although the court jettisoned the bulk of its citations from its earlier opinion, *compare* Pet.App.20-21, *with* Pet.App.60-62 & n.3, it again believed itself bound by circuit precedent under which employees must be treated as subject to the FLSA unless they "plainly and unmistakably" fall within an exemption. *Solis*, 656 F.3d at 1083.

That purported "rule of narrow construction" (Pet.App.20) is just an FLSA-specific variant of the now-repudiated notion that courts should interpret "remedial" statutes broadly. *See, e.g.*, *OWCP v. Newport News Shipbuilding*, 514 U.S. 122, 135-36 (1995) (describing broad-construction canon as "that last redoubt of losing causes"). And applying this misguided canon does nothing but guarantee extravagant results in FLSA cases. The goal of a court interpreting a statute "should be neither liberally to expand nor strictly to constrict its meaning, but rather to get the meaning precisely right." Antonin Scalia, *Assorted Canards of Contemporary Legal Analysis*, 40 Case W. Res. L. Rev. 581, 582 (1990). Thus, in addition to addressing the circuit split concerning the meaning of §213(b)(10)(A), granting plenary review would give this Court an important opportunity to clarify once and for all that the FLSA should be construed neither narrowly nor broadly, but fairly and correctly.

II. The Ninth Circuit's Erroneous Decision Will Have Far-Reaching Implications For Dealerships And Will Inject Uncertainty Into A Previously Settled Area Of The Law.

The scope of the FLSA exemption under §213(b)(10)(A) is of tremendous practical significance to the automobile industry nationwide. The nation's 18,000 franchised car and truck dealerships employ tens of thousands of service advisors. As this Court has recognized, "[d]ealerships and service advisors negotiated and structured their compensation plans against this background understanding" that service advisors were exempt from the FLSA's overtime rules. Pet.App.42. Yet the Ninth Circuit has now concluded—again—that this entire arrangement has been unlawful for the last four decades.

This Court has not looked favorably upon attempts by plaintiffs to use novel theories of FLSA liability to upset long-settled industry practices. As the Court has explained, it may be "possible for an entire industry to be in violation of the [FLSA] for a long time" with no one noticing, but the "more plausible hypothesis" is that the industry's practices simply were not unlawful. *Christopher*, 567 U.S. at 158. The Court has thus repeatedly rejected FLSA claims that would have exposed settled industry practices to potentially significant retroactive liability (including back pay and double damages). *See, e.g.*, *Integrity Staffing*, 135 S. Ct. at 518-19 (rejecting novel attempt to impose FLSA liability for time spent in security screenings); *Christopher*, 567 U.S. at 157, 161-169 (rejecting FLSA liability for pharmaceutical sales representatives where "the pharmaceutical industry had little reason to suspect that its longstanding practice of treating [sales representatives] as exempt ... transgressed the FLSA"); *see also Yi*, 480 F.3d at 510-11 (rejecting FLSA challenge to a "system of compensation [that] ... is industry-wide, and of long standing").

Those concerns are particularly acute given the regulatory history here. In the immediate wake of its 1970 interpretative rule, DOL pursued enforcement actions that produced an unbroken series of court losses for the agency, including the Fifth Circuit's *Deel Motors* decision and the Sixth Circuit's summary affirmance in *North Brothers Ford*. *See supra* at 8-10 & n.3. If those decisions had gone the other way, employment relationships in this sector would have developed very differently. But DOL not only lost those cases across the country but acquiesced in those decisions, thereby creating significant and well-justified reliance interests that accumulated over the ensuing decades.

The concerns with retroactively upsetting those expectations are at their zenith in cases like this and *Christopher* where the plaintiffs seek to have employees who were actually paid on a commission-basis retroactively reclassified as non-exempt employees. Not only were workers focused on earning commissions, rather than working a set number of hours, but employers did not have an incentive to strictly track the number of hours worked, which creates both evidentiary difficulties and the prospect of wholly unjustified windfalls. *See Christopher*, 567 U.S. at 166 (sales work was "difficult to standardize to any time frame," which "ma[de] compliance with the overtime provisions difficult"). And, of course, the Ninth Circuit's holding would force both service advisors and dealerships into compensation plans other than the ones they had voluntarily negotiated, to the detriment of employers and employees alike.

The problems with allowing Respondents to reap such windfalls are exacerbated by the differential treatment implicit in the Ninth Circuit's decision. Under the approach adopted by every other court to consider the issue, all sales employees are treated the same, *viz.*, as exempt. The Ninth Circuit's decision, however, would grant service advisors, but not other salespeople (or others engaged in providing service, such as partsmen or mechanics), a huge windfall, which cannot help but prove to be divisive. Thus, dealers would face the prospect of not only having to pay out damages retrospectively, but also needing to deal with anomalous divisions among their salesforces going forward. To make matters worse, the Ninth Circuit's conclusion that service advisors are not exempt because they do not *personally* service automobiles throws the long-settled treatment of partsmen—many, if not most, of whom do not personally service automobiles—into disarray.

All of those concerns are magnified by the reality, noted above, that the FLSA provides for nationwide collective actions. *See* 29 U.S.C. §216(b). As a consequence, the Ninth Circuit's decision will likely become the *de facto* nationwide rule for all dealerships that have at least some operations within the Ninth

Circuit. Thus, this is not a case in which further percolation of the relevant issues would be helpful or desirable. The far better course is to grant certiorari now to restore uniformity to this important area of the law and reaffirm what numerous courts have held since the 1970s—that service advisors are exempt from the FLSA's overtime rules under the plain text of 29 U.S.C. §213(b)(10)(A).

CONCLUSION

In sum, every consideration that led this Court to grant certiorari in this case last January remains fully applicable in light of the Ninth Circuit's decision to reaffirm its outlying treatment of service advisors as non-exempt. Indeed, the statutory issue is now presented more cleanly, and any possibility of the Ninth Circuit aligning its view with its sister circuits has been exhausted. This Court should once again grant review of the important question presented by this petition.

Respectfully submitted,

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May 10, 2017

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Appendix A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 13-55323

HECTOR NAVARRO; ANTHONY PINKINS; KEVIN MALONE;
AND REUBEN CASTRO,

Plaintiffs-Appellants,

v.

ENCINO MOTORCARS, LLC, ERRONEOUSLY SUED AS
MERCEDES BENZ OF ENCINO, A CORPORATION,

Defendant-Appellee.

On Remand from the
Supreme Court of the United States

Filed: January 9, 2017

Before: Susan P. Graber and
Kim McLane Wardlaw, Circuit Judges, and
James C. Mahan,* District Judge.

OPINION

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* The Honorable James C. Mahan, United States District Judge for the District of Nevada, sitting by designation.

GRABER, Circuit Judge:

On remand from the Supreme Court, *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117 (2016), we must consider anew whether the Fair Labor Standards Act ("FLSA"), 29 U.S.C. §§ 201-219, requires automobile dealerships to pay overtime compensation to service advisors. The district court held that service advisors fall within the exemption from the overtime-compensation requirement for "any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles," *id.* § 213(b)(10)(A), on the ground that a service advisor is a "salesman . . . primarily engaged in . . . servicing automobiles." Because we conclude that Congress did not intend for the exemption to encompass service advisors, we reverse and remand for further proceedings.

FACTUAL AND PROCEDURAL HISTORY

Defendant Encino Motorcars, LLC, sells and services new and used Mercedes-Benz automobiles.[1] Defendant employed or employs Plaintiffs Hector Navarro, Mike Shirinian, Anthony Pinkins, Kevin Malone, and Reuben Castro as "service advisors." Plaintiffs greet Mercedes-Benz owners as they arrive in the service area of the dealership; listen to customers' concerns about their cars; evaluate the repair and maintenance needs of the cars; suggest services to be performed to remedy the customers' concerns; suggest supplemental services beyond those that will remedy the customers' concerns; write up estimates; and, often, follow up with the customer while the repair work is underway to suggest further repairs and maintenance.

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[1] Because the district court dismissed this case under Federal Rule of Civil Procedure 12(b)(6), we take the facts alleged in the complaint as true. *Brown v. Elec. Arts, Inc.*, 724 F.3d 1235, 1247 (9th Cir. 2013).

Plaintiffs allege that Defendant has violated the FLSA by failing to pay them overtime wages. The district court dismissed the claim, and Plaintiffs timely appealed.

We reversed. *Navarro v. Encino Motorcars, LLC*, 780 F.3d 1267 (9th Cir. 2015). We held that a regulation promulgated by the Department of Labor in 2011 reasonably interpreted the statutory exemption not to encompass service advisors. *Id.* at 1271-77. Applying the principles of agency deference described in *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984), we deferred to the agency's interpretation. *Navarro*, 780 F.3d at 1277.

The Supreme Court granted certiorari and held that we erred by applying the *Chevron* framework. *Encino Motorcars*, 136 S. Ct. at 2124-27. The Court concluded that

> § 213(b)(10)(A) must be construed without placing controlling weight on the Department's 2011 regulation. Because the decision below relied on *Chevron* deference to this regulation, it is appropriate to remand for the Court of Appeals to interpret the statute in the first instance. *Cf. United States v. Mead Corp*, 533 U.S. 218, 238-39 (2001).

Id. at 2127 (citation format altered).

DISCUSSION

Congress enacted the FLSA in 1938 to "protect all covered workers from substandard wages and oppressive working hours." *Barrentine v. Ark.-Best Freight Sys., Inc.*, 450 U.S. 728, 739 (1981). To that end, 29 U.S.C. § 206 imposes a minimum wage requirement, and § 207 requires the payment of overtime compensation for hours exceeding a standard workweek. But not all workers are covered by the Act's provisions. Subsection 213(a) lists categories of employees who are exempt from both the minimum-wage and overtime-compensation requirements. Subsection 213(b) lists categories of employees who are exempt from the overtime-compensation requirement only.

In 1961, Congress amended § 213(a) to exempt from both the minimum-wage and overtime-compensation requirements all employees of automobile dealerships. Fair Labor Standards Amendments of 1961, Pub. L. No. 87-30, § 9, 75 Stat. 65, 71. New paragraph (a)(19) exempted "any employee of a retail or service establishment which is primarily engaged in the business of selling automobiles, trucks, or farm implements." 29 U.S.C. § 213(a)(19) (1961); 75 Stat. at 71.

In 1966, Congress repealed § 213(a)(19) but added paragraph (b)(10). Fair Labor Standards Amendments of 1966, Pub. L. No. 89-601, § 208, 80 Stat. 830, 836. The new provision exempted only the following employees from the overtime-compensation requirement:

> any salesman, partsman, or mechanic primarily engaged in selling or servicing

> automobiles, trailers, trucks, farm implements, or aircraft if employed by a nonmanufacturing establishment primarily engaged in the business of selling such vehicles to ultimate purchasers.

29 U.S.C. § 213(b)(10) (1966). In effect, unless a separate exemption applied, the 1966 amendments narrowed the 1961 exemption and required dealerships to pay a minimum wage to all employees and to pay overtime compensation to all employees except those listed in § 213(b)(10).

In 1970, the Department of Labor issued a regulation defining the terms of § 213(b)(10). 29 C.F.R. § 779.372. The agency defined "salesman" to encompass only those salesmen who sold vehicles. *Id.* § 779.372(c)(1). Under the agency's interpretation, the exemption did not encompass service advisors. *Id.*; *see also id.* § 779.372(c)(4) (1970).

In 1974, Congress amended § 213(b)(10) to its present-day form to exclude from the overtime-compensation requirement the following employees:

> (A) any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles, trucks, or farm implements, if he is employed by a nonmanufacturing establishment primarily engaged in the business of selling such vehicles or implements to ultimate purchasers; or
>
> (B) any salesman primarily engaged in selling trailers, boats, or aircraft, if he is employed by a nonmanufacturing establishment primarily engaged in the business of selling

> trailers, boats, or aircraft to ultimate purchasers[.]

29 U.S.C. § 213(b)(10) (2016); Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, § 14, 88 Stat. 55, 61. The 1974 amendments had no effect on the text pertinent to car dealerships—the same exemptions as in 1966 continued to apply.

In 1978, the Department of Labor issued an opinion letter stating that, contrary to the agency's regulation, service advisors were exempt under 29 U.S.C. § 213(b)(10)(A). Dep't of Labor, Wage & Hour Div., Opinion Letter No. 1520 (WH-467), 1978 WL 51403 (July 28, 1978). In 1987, the agency amended its Field Operations Handbook along the same lines, stating in an Insert that the agency would "no longer deny the [overtime] exemption" for service advisors. Dep't of Labor, Wage & Hour Div., Field Operations Handbook, Insert No. 1757, 24L04-4(k) (Oct. 20, 1987).

In 2008, the Department of Labor proposed to amend its formal regulation—which had remained the same since 1970 despite the agency's shift in position—to conform to its practice of allowing the exemption for service advisors. Updating Regulations Issued Under the Fair Labor Standards Act, 73 Fed. Reg. 43,654-01 (July 28, 2008). After receiving public comments, however, the agency issued a final rule in 2011 that reaffirmed the agency's original position: service advisors are not exempt under 29 U.S.C. § 213(b)(10)(A). 76 Fed. Reg. 18,832-01 (Apr. 5, 2011).[2]

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[2] The Secretary of Labor has informed us that, also in 2011, the agency amended its Field Operations Handbook by removing the

The parties dispute whether we owe deference to the Secretary of Labor's interpretation that the statute does not exempt service advisors. Plaintiffs argue that deference under *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944), is appropriate. Defendant urges us to give no weight to the agency's interpretation. We decline to resolve this dispute because, as we explain below, the answer does not affect the outcome. Instead, we assume without deciding that we must give no weight to the agency's interpretation and the regulation, and we "interpret the statute in the first instance."[3] *Encino Motorcars*, 136 S. Ct. at 2127.

The FLSA exempts from the overtime-compensation requirement "any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles, trucks, or farm implements, if he is employed by a nonmanufacturing establishment primarily engaged in the business of selling such vehicles or implements to ultimate purchasers." 29 U.S.C. § 213(b)(10)(A). Defendant is an automobile dealership within the meaning of the exemption. We limit our discussion to the exemption's coverage of employees of an automobile dealership. Thus, the

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1987 Insert, thus reverting to its original enforcement practice. Brief for Sec'y of Labor as Amicus Curiae Supporting Plaintiffs-Appellants at 5 n.1.

[3] We do so out of an abundance of caution. If we have misunderstood the Court's instructions and are permitted or required to consider *Skidmore* deference, then we conclude that such deference is appropriate. Although the agency held a contrary position in intervening years, we find the agency's present reasoning persuasive and thorough. Moreover, the agency's current position is identical to the position that it took in 1970—shortly after enactment of the 1966 amendments.

relevant statutory passage is: "any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles."

Unless defined by the FLSA, we consider the "ordinary, contemporary, common meaning" of the terms at the time that Congress added the relevant clause—1966. *Perrin v. United States*, 444 U.S. 37, 42 (1979). To determine the common meaning, we consult dictionaries and other sources in use in 1966. *Taniguchi v. Kan Pac. Saipan, Ltd.*, 132 S. Ct. 1997, 2002-04 (2012). For an understanding of job descriptions, we look to the 1966-1967 edition of the Department of Labor, Bureau of Statistics, Occupational Outlook Handbook ("OOH"). *See, e.g.*, *United States v. Charles*, 722 F.3d 1319, 1324 (11th Cir. 2013) (consulting the Occupational Outlook Handbook).

We proceed as follows. First, we conclude that, under the most natural reading of the statute, Congress did not intend to exempt service advisors. Second, even if the text were ambiguous, the legislative history confirms that Congress intended to exempt only salesmen selling cars, partsmen servicing cars, and mechanics servicing cars. Congress did not intend to exempt service advisors.

A. Statutory Text

1. "Any Salesman, Partsman, or Mechanic"

In 1966, Congress repealed the exemption for *all employees* of an automobile dealership and replaced it with a limited exemption for only *three specific vocations*: salesmen, partsmen, and mechanics. Then, as today, many different types of employees—including service advisors—worked at automobile dealerships. The Occupational Outlook Handbook listed many common vocations. Among those categories of workers that one might have expected to find at automobile dealerships in 1966, three job titles—emphasized below—clearly align with the three job titles exempted by Congress:

- Automobile body repairmen
- **Automobile mechanics**
- Automobile painters
- **Automobile parts countermen**
- **Automobile salesmen**
- Automobile service advisors
- Automobile upholsterers
- Bookkeeping workers
- Cashiers
- Janitors
- Purchasing agents
- Shipping and receiving clerks

OOH at XIII-XVIII (Table of Contents).

Hence, looking only at the statutory exemption's list of job titles, service advisors were excluded. Congress' choice to exempt three—not four—job titles suggests that service advisors are not exempt. If, as Defendant posits, Congress intended to exempt service advisors, it could have included "service advisors" in the statutory list. In sum, the most natural reading of the exemption is that Congress exempted only three commonly understood job titles—automobile salesmen, partsmen, and mechanics—and Congress therefore excluded service advisors.

It is possible to read the exemption's list of job titles more broadly, to encompass all persons whose functional roles meet the dictionary definitions of the terms "salesman," "partsman," or "mechanic."[4] A service advisor can be considered to sell services. Accordingly, if we read the exemption's list of job titles broadly, a service advisor qualifies, in a generic sense, as a "salesman."[5]

But even assuming that Congress intended a broad interpretation of the term "salesman," not every "salesman" is exempt; the statute covers only those who are "primarily engaged in selling or servicing automobiles." 29 U.S.C. § 213(b)(10)(A). We therefore consider next whether service advisors primarily engage in selling or servicing cars.

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[4] We give the term "any" no significance. The term "any" "do[es] not broaden the ordinary meaning" of the word it modifies. *BP Am. Prod. Co. v. Burton*, 549 U.S. 84, 93 (2006). That principle applies with special force here. Both before and after the 1966 amendments to the FLSA, each of the 33 exemptions in § 213(a) and § 213(b) began with the term "any." *See* 29 U.S.C. § 213(a)(1)-(22) (1965) (beginning with "any"); *id.* § 213(b)(1)-(11) (1965) (same); *id.* § 213(a)(1)-(14) (1967) (same); *id.* § 213(b)(1)-(19) (1967) (same). The word "any" was plainly a drafting convention, not an expression of congressional intent that we interpret a particular exemption expansively.

[5] *See* Random House Dictionary of the English Language ("Random House") 1262 (1966) (defining "salesman" as "a man who sells goods, services, etc."); Webster's Third New International Dictionary ("Webster's Third") 2003 (1965) ("one employed to sell goods or services either within a given territory or in a store"); 9 Oxford English Dictionary ("OED") 50 (1933) ("A man whose business it is to sell goods or conduct sales"); *see also* American Heritage Dictionary of the English Language ("American Heritage") 1144 (1st ed. 1969) ("A man employed to sell merchandise in a store or in a designated territory").

2. "Primarily Engaged in Selling or Servicing Automobiles"

A service advisor clearly is not a "salesman . . . primarily engaged in selling . . . automobiles." That category encompasses salesmen selling a particular good—cars. It does not cover salesmen selling other goods and, critically, it does not cover salesmen selling services. Service advisors may be salesmen of a sort, but they do not qualify as salesmen primarily engaged in selling cars because they do not sell cars.

We turn, then, to whether service advisors are "primarily engaged in . . . servicing automobiles." We begin with the contemporary meaning, in 1966, of the statute's terms. "Primarily" means "essentially; mostly; chiefly; principally."[6] "To be engaged in" an activity means "to occupy oneself; become involved" in the activity.[7] In the context of an automobile dealership, to "service" means to "supply[]

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[6] Random House at 1142; *accord* 8 OED at 1358 ("In the first place, first of all, pre-eminently, chiefly, principally; essentially."); *see also* American Heritage at 1039 ("Chiefly; principally").

[7] Random House at 473; *accord* 8 OED at 174 ("to enter upon or employ oneself in an action"); Webster's Third at 751 ("to employ or involve oneself'; "to take part"); *see also* American Heritage at 433 ("To involve oneself or become occupied; participate").

maintenance and repair."[8] Thus, to be "primarily engaged in . . . servicing automobiles" means to "occupy oneself principally in maintaining and repairing cars."

Whether we look to the contemporaneous dictionary definitions or to the terms of the phrase itself, the phrase most naturally encompasses only those who are actually occupied in the repair and maintenance of cars—the partsmen and mechanics who, for example, repair defective brakes or flush the transmission. A service advisor neither performs any repairs nor provides any maintenance. Instead, a service advisor "wait[s] on customers who bring their automobiles in for maintenance and repairs." OOH at 314. The service advisor "confers with the customer to determine his service needs, and arranges for a mechanic to do the work." *Id.* Accordingly, service advisors are not primarily engaged in servicing automobiles.[9]

Defendant suggests that we adopt a more expansive definition, one that encompasses all employees who are "integral" to the customer's overall experience of having a car serviced. Supp. Brief for Defendant-Appellee at 14 (filed Aug. 16, 2016). The statutory text is arguably flexible enough to accommodate Defendant's suggestion. Using the dictionary definitions most favorable to Defendant, the exemption encompasses those principally "involved" in "supplying maintenance and repair." If one interprets "supplying" to mean "the overall process of supplying," then service advisors can be said, in a general sense, to be "primarily engaged in . . . servicing automobiles."

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[8] Random House at 1304; *accord* Webster's Third at 2075 ("to repair or provide maintenance for"); *see also* American Heritage at 1185 ("To make fit for use; adjust; repair; maintain").

[9] Service advisors may occasionally perform simple repairs or maintenance tasks before the mechanic takes over. But Defendant does not contend that Plaintiffs spend a significant amount of time on those minor tasks.

But the fact "[t]hat a definition is broad enough to encompass one sense of a word does not establish that the word is *ordinarily* understood in that sense." *Taniguchi*, 132 S. Ct. at 2003. Defendant's interpretation represents a considerable stretch of the ordinary meaning of the statute's words. We usually do not say that we primarily engage in an activity that we do not perform personally (and that we may lack the skills to perform). We typically say that we primarily engage in an activity only if we actually undertake the activity, at least in part. For example, a receptionist-scheduler at a dental office fields calls from patients, matching their needs (e.g., a broken tooth or jaw pain) with the appropriate provider, appointment time, and length of anticipated service. That work is integral to a patient's obtaining dental services, but we would not say that the receptionist-scheduler is "primarily engaged in" cleaning teeth or installing crowns. Similarly, an automobile salesman who sells custom-made cars is integral to a purchaser's receiving a specialized car, but we ordinarily would not say that the salesman is primarily engaged in manufacturing cars.

Defendant nevertheless asserts that we must adopt its broad definition because a narrower interpretation would read "partsman" out of the statute. Defendant contends that, because partsmen do not actually perform the repairs and maintenance, Congress must have intended to include all employees involved in the overall process of providing repair and maintenance services. We are unpersuaded.

The Occupational Outlook Handbook described the position of an "automobile parts counterman" who is employed by automobile dealers. OOH at 312-14. Parts countermen may spend some time selling parts to customers. *Id.* at 312. But parts countermen "employed by automobile and truck dealers . . . may spend most of their time supplying parts to mechanics employed by the dealer." *Id.*; *see also* Brief for Int'l Ass'n of Machinists and Aerospace Workers as Amicus Curiae Supporting Respondents in *Encino Motorcars*, 2016 WL 1388060, at *28 ("A partsman generally works at one of two counters: the back counter, which opens to the shop where the mechanics work or the front counter, which opens into the dealership to an area where customers may purchase accessories or parts that will not be installed by the dealership."). "By knowing how to use parts catalogs and by knowing the layout of the stockroom, he can readily find any one of several thousand items." OOH at 312. A parts counterman also uses specialized equipment to test parts, to determine interchangeability of parts, and to repair parts. *Id.* at 312-13.

Accordingly, Defendant's premise is wrong: Partsmen "may repair parts, using equipment such as brake riveting machines, brake drum lathes, valve refacers, and engine head grinders." OOH at 313. Under any definition, fixing a defective part qualifies as servicing a car. Partsmen also "may use micrometers, calipers, fan-belt measurers, and other devices to measure parts for interchangeability. They may also use coil-condenser testers, spark plug testers, and other types of testing equipment to determine whether parts are defective." *Id.* at 312-13. Those hands-on tasks are qualitatively indistinguishable from—if not identical to—the work of a mechanic. Similarly, partsmen use their expert knowledge of parts, parts catalogs, and the stockroom to determine an appropriate replacement part and locate it for a mechanic—tasks that contribute directly to the actual repair of a car. Because most of the common tasks of a partsman easily meet the ordinary meaning of primarily engaging in servicing, we are not compelled to accept Defendant's broad interpretation of the exemption.[10]

In sum, we conclude that the phrase "primarily engaged in selling . . . automobiles" encompasses only those who are actually and primarily occupied in selling cars, and we conclude that the phrase "primarily engaged in . . . servicing automobiles" encompasses only those who are actually and primarily occupied in the repair and maintenance of cars. Because service advisors meet neither definition, the FLSA does not exempt service advisors.

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[10] It is true, of course, that partsmen may spend some time on tasks unrelated to the servicing of an automobile: They may clean the stockroom, or they may sell parts to the public, for example. But that fact poses no interpretive problem because the exemption covers only those who "primarily" service cars. If an individual partsman spends little time servicing cars, the exemption does not apply.

Our interpretive task could end here, with the words of the statute as commonly understood in 1966. But, to ensure that we have not overlooked a relevant way of reading § 213(b)(10)(A), we will examine that provision in light of applicable principles of statutory construction.

3. Principles of Statutory Interpretation

Our interpretation comports with a holistic reading of the statutory exemption. *See, e.g.*, *Graham Cty. Soil & Water Conservation Dist. v. U.S. ex rel. Wilson*, 559 U.S. 280, 290 (2010) ("Courts have a duty to construe statutes, not isolated provisions." (internal quotation marks omitted)); *see also Sturgeon v. Frost*, 136 S. Ct. 1061, 1070 (2016) ("It is a fundamental canon of statutory construction that the words of a statute must be read in their context . . . " (internal quotation marks omitted)). Read literally, the exemption encompasses six categories of employees:

Salesman primarily engaged in selling	Partsman primarily engaged in selling	Mechanic primarily engaged in selling
Salesman primarily engaged in servicing	Partsman primarily engaged in servicing	Mechanic primarily engaged in servicing

Three of the literal categories describe common employees at a dealership: salesmen selling cars, partsmen servicing cars, and mechanics servicing cars. A "salesman . . . primarily engaged in selling . . . automobiles" neatly describes a car salesman.[11] As noted above, many parts countermen likely qualify as "partsm[e]n . . . primarily engaged in . . . servicing automobiles." And it is unassailable that most (if not all) automobile mechanics service cars.[12] The remaining three literal categories are: a "salesman . . . primarily engaged in . . . servicing automobiles," a "partsman . . . primarily engaged in selling . . . automobiles," and a "mechanic primarily engaged in selling . . . automobiles." Reading the exemption as a whole, we conclude that Congress did not intend to give meaning to those categories.

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[11] "Automobile salesmen" were "important links between the makers and buyers of new cars, and between used car dealers and buyers." OOH at 309. "The automobile salesman spends much of his time waiting on customers," trying to make a sale. *Id.* at 310.

A salesman is naturally understood to be someone primarily engaged in selling. After all, he is a *sales*man, defined at the relevant time as "a man who *sells*." Random House at 1262 (emphasis added). It makes little sense, in ordinary speech, to describe a salesman who *primarily* engages in work activities *other than selling*.

Moreover, we know that Congress did not intend for us to give effect to all six literal categories. Read literally, the statute exempts partsmen and mechanics primarily engaged in selling cars, but those categories do not exist in the real world. Neither partsmen nor mechanics occupy themselves regularly, let alone most of the time, with selling cars. By definition, they spend most of their time repairing cars, maintaining cars, repairing parts, determining interchangeability of parts, finding suitable replacement parts in the stockroom, and so on.

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[12] "Automobile mechanics keep the Nation's rising number of automobiles . . . in good running order. They do preventative maintenance, diagnose breakdowns, and make repairs." OOH at 477.

Congress indisputably did not intend to connect "partsman" and "mechanic" with "selling" automobiles; Congress intended to connect "partsman" and "mechanic" *only* with "servicing" automobiles.

Putting it all together, the most natural reading of the statute is that Congress intended the gerunds—selling and servicing—to be distributed to their appropriate subjects—salesman, partsman, and mechanic. A salesman sells; a partsman services; and a mechanic services.

At first blush, it may seem odd for Congress to choose phrasing that, read literally, joins nouns with inapplicable verbs. But Congress sometimes makes that choice. *See, e.g.*, 16 U.S.C. § 742c(e) (referring to "the construction or repair of vessels lost, destroyed, or damaged" by an earthquake); *see also* Brief for Respondents in *Encino Motorcars*, 2016 WL 1298032, app. D (listing scores of statutory phrases using this distributive construction). Scholars and courts have recognized this method of distributive phrasing: "Where a sentence contains several antecedents and several consequents, courts read them distributively and apply the words to the subjects which, by context, they seem most properly to relate." 2A Norman Singer et al., Sutherland Statutes and Statutory Construction § 47:26 (7th ed. Supp. Nov. 2016); *see id.* at n.1 (collecting cases); *see also* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 214 (2012) ("Distributive phrasing applies each expression to its appropriate referent."); *id.* at 214-16 (describing cases that applied the principle).

The most natural reading of these statutes is not that Congress wanted to give legal effect to each literal category. Rather, Congress merely used expedient wording to avoid tedious repetition of surrounding text, with the expectation that courts would read the statutes sensibly. This statute provides a good example. Congress could have separated out the treatment of salesmen from the treatment of partsmen and mechanics. But that would have required repeating the "primarily engaged in" text, the list of vehicles— "automobiles, trailers, trucks, farm implements, or aircraft"— and the clause concerning employment at a dealership—"if employed by a nonmanufacturing establishment primarily engaged in the business of selling such vehicles to ultimate purchasers." 29 U.S.C. § 213(b)(10) (1966). Instead, Congress trusted courts to recognize the obvious: Congress meant to exempt salesmen selling, not repairing, cars; and Congress meant to exempt partsmen and mechanics repairing, not selling, cars. Thus, the statute leaves only three categories of exempt employees:[13]

Salesman primarily engaged in selling	~~Partsman primarily engaged in selling~~	~~Mechanic primarily engaged in selling~~
~~Salesman primarily engaged in servicing~~	Partsman primarily engaged in servicing	Mechanic primarily engaged in servicing

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[13] We address here only automobile dealerships. There is some suggestion in the legislative history that partsmen employed by farm-implement dealers were understood to sell farm implements. But we have found no suggestion—in the legislative history or otherwise—that automobile partsmen sell cars.

4. Narrow Construction of the FLSA's Exemptions

We find Defendant's expansive interpretation particularly implausible in light of the longstanding rule that the exemptions in § 213 of the FLSA "are to be narrowly construed against the employers seeking to assert them." *Arnold v. Ben Kanowsky, Inc.*, 361 U.S. 388, 392 (1960); *accord Mitchell v. Ky. Fin. Co.*, 359 U.S. 290, 295 (1959) (holding that the principle of narrow construction of the FLSA's exemptions is "well settled"). We must apply exemptions only to "those [employees] plainly and unmistakably within [the FLSA's] terms." *A.H. Phillips, Inc. v. Walling*, 324 U.S. 490, 493 (1945). In order to conclude that § 213(b)(10)(A) encompasses service advisors, we would be required to do the opposite—construe the exemption broadly. We are bound by Supreme Court precedent to construe the exemption narrowly.

In recent years, the Supreme Court has acknowledged the rule of narrow construction with respect to the exemptions listed in § 213, but the Court has held that the rule does not apply to interpretations of other provisions of the FLSA, such as the general definitions codified in § 203. *Sandifer v. U.S. Steel Corp.*, 134 S. Ct. 870, 879 n.7 (2014); *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2172 n.21 (2012). Because this case involves interpretation of terms appearing in § 213 and not defined in § 203, the Supreme Court's longstanding principle of narrow construction applies here. We recognize that some members of the Supreme Court have questioned the soundness of the rule of narrow construction. *E.g.*, *Encino Motorcars*, 136 S. Ct. at 2131 (Thomas, J., dissenting). But we may not disregard the Court's existing, binding precedent. *See, e.g.*, *Bosse v. Oklahoma*, 137 S. Ct. 1, 1 (2016) (per curiam) ("It is this Court's prerogative alone to overrule one of its precedents." (internal quotation marks and brackets omitted)); *id.* ("Our decisions remain binding precedent until we see fit to reconsider them, regardless of whether subsequent cases have raised doubts about their continuing vitality." (internal quotation marks omitted)).[14]

In sum, we are convinced that Congress intended to exempt only salesmen selling cars, partsmen servicing cars, and mechanics servicing cars. We agree with Defendant that, under an expansive interpretation of the literal category of a "salesman . . . primarily engaged in . . . servicing automobiles," the statute could be construed as exempting service advisors. But in light of the ordinary meaning of the exemption's words and the rule that we must interpret exemptions narrowly, we find that interpretation implausible. We nevertheless assume that Defendant's interpretation creates an ambiguity. Accordingly, we examine legislative history below.

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[14] For the sake of judicial economy, we note that we would reach the same ultimate holding—that the exemption does not encompass service advisors—even if the rule of narrow construction did not apply. Defendant's interpretation creates, at most, an ambiguity. Because legislative history strongly suggests that Congress did not intend to exempt service advisors, our ultimate holding is the same, whether or not we apply the principle of narrow construction.

B. Legislative History

As we have noted, in 1966, Congress enacted new § 213(b)(10), exempting from the overtime-compensation requirement "any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles" at a dealership. During hearings before subcommittees of the House and the Senate, the National Automobile Dealership Association had sought an overtime exemption for two specific categories of employees: automobile salesmen and mechanics.[15] According to the Association, automobile salesmen and mechanics were well paid, and they often worked unusual hours; accordingly, overtime compensation would be both unnecessary and challenging to calculate. ***1965 House Hearings*** at 368-69; ***1965 Senate Hearings*** at 1237-38. The testimony was not new. The Association had given similar testimony in 1961, 1960, 1959, and 1957,[16] in response to earlier proposals for the FLSA to cover dealerships' employees. In sum, when the full Congress took up the proposal, the automobile-dealership industry had made clear its concerns about applying the overtime-compensation requirement to two specific categories of employees: automobile salesmen and mechanics.

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[15] *Minimum Wage-Hour Amendments: Hearings on H.R. 8259 Before the Gen. Subcomm. on Labor of the H. Comm. on Educ. & Labor*, 89th Cong. 366-77 (1965) ("***1965 House Hearings***") (statement of Sam H. White, Chairman, Govt'l Relations Comm., Nat'l Auto. Dealers Ass'n); *Amendments to the Fair Labor Standards Act: Hearings on S. 763 et al. Before the Subcomm. on Labor of the S. Comm. on Labor & Pub. Welfare*, 89th Cong. 1236-38 (1965) ("***1965 Senate Hearings***") (statement of Sam H. White, Chairman, Govt'l Relations Comm., Nat'l Auto. Dealers Ass'n).

[16] *Amendments to the Fair Labor Standards Act: Hearings on S. 256 et al. Before the Subcomm. on Labor of the S. Comm. on Labor & Pub. Welfare*, 87th Cong. 175-82 (1961) (statement of S.E. Kossman, Chairman, Nat'l Affairs Comm., Nat'l Auto. Dealers Ass'n); *Minimum Wage-Hour Legislation: Hearings Before the Subcomm. on Labor Standards of the H. Comm. on Educ. & Labor*, 86th Cong. 1391-94 (1960) ("***1960 House Hearings***") (statement of William J. Cleveland, Director, Nat'l Auto. Dealers

The legislative history contains only one probative discussion by members of Congress: a debate in the Senate about whether to exempt partsmen in addition to automobile salesmen and mechanics. 112 Cong. Rec. 20,502-06 (1966). Everyone agreed that automobile salesmen[17] and mechanics

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Ass'n); *To Amend the Fair Labor Standards Act: Hearings on S. 25 et al. Before the Subcomm. on Labor of the S. Comm. on Labor & Pub. Welfare* , 86th Cong. 205-14 (1959) ("*1959 Senate Hearings*") (statement of William J. Cleveland, Nat'l Auto. Dealers Ass'n); *Fair Labor Standards Act: Hearings Before a Subcomm. of the H. Comm. on Educ. & Labor*, 85th Cong. 251-77 (1957) ("*1957 House Hearings*") (statement of Frederick M. Sutter, President, Nat'l Auto. Dealers Ass'n); *Proposals to Extend Coverage of Minimum Wage Protection: Hearings on S. 1135 et al. Before the Subcomm. on Labor of the S. Comm. on Labor & Pub. Welfare*, 85th Cong. 113-33 (1957) ("*1957 Senate Hearings*") (statement of Frederick J. Bell, Rear Admiral USN (Ret.), Executive Vice President, Nat'l Auto. Dealers Ass'n); *see also id.* at 1160-61 (letter dated Mar. 29, 1957, from the South Carolina Automobile Dealers Association, expressing similar sentiments).

[17] Notably, the Senators implicitly assumed that "salesman" referred to someone who sells cars. *See* 112 Cong. Rec. 20,504 ("[An amendment] would not affect the salesman. He can go out and sell an Oldsmobile, a Pontiac, or a Buick all day long and all night. He is not under any overtime." (statement of Sen. Yarborough)); *id.* ("The salesman tries to get people mainly after their hours of work. In some cases a man will leave his job, get his wife, and go to look at automobiles." (statement of Sen. Yarborough)); *id.* ("Salesmen . . . go out at unusual hours, trying to earn commissions." (statement of Sen. Bayh)). One

work irregular hours, sometimes away from the dealership. *See, e.g.*, *id.* at 20,504 ("Salesmen are a little different breed of cats, because they go out at unusual hours . . . ." (statement of Sen. Bayh)); *id.* ("My experience with automobiles has been that the mechanic goes out and answers calls in the rural areas." (statement of Sen. Yarborough)). The debate centered on whether the same was true of partsmen. Some Senators thought that partsmen had to work irregular hours and, accordingly, should also be exempt. *See, e.g.*, *id.* at 20,502 ("In many instances it is essential that partsmen work longer hours or at other than regular times. This is especially true in the farm equipment business . . . . Because of these factors, it would not be easy to place partsmen on a time-clock basis and to compute overtime compensation in an equitable manner." (statement of Sen. Bayh)); *id.* at 20,503 ("The partsman does occupy a significant and unusual position in the agricultural economy. He has to be available during the harvesting season—and before and after, to a lesser extent—at all hours of the day." (statement of Sen. Mansfield)). Other Senators thought that partsmen worked inside

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commentator has interpreted a passage by Senator Javits as implicitly mentioning service advisors as a form of salesman. Note, *Show Me the Money: On Whether Car Dealership Service Advisors Are Entitled to or Exempt From Overtime Pay Under the FLSA*, 91 Notre Dame L. Rev. 1707, 1731 (Apr. 2016). We draw the opposite inference from the transcript. Senator Javits noted that "the mechanic and the salesman [are] subject to call at any time that a fellow's car broke down." 112 Cong. Rec. 20,506. We read that comment to mean simply that, when one's car fails, there are two options—fix it (via a mechanic) or replace it (via a car salesman).

only and, accordingly, like all other ordinary employees of a dealership, should not be exempt. *See id.* at 20,504 ("The mechanics and the salesmen . . . do not get overtime because their work is outside. . . . The partsman works inside." (statement of Sen. Yarborough)); *id.* ("[A] partsman is an inside man. The reason for exempting the salesmen and the mechanics was the difficulty of their keeping regular hours." (statement of Sen. Yarborough)); *id.* at 20,505 ("[T]here is no excuse whatever for including partsmen in the overtime exemption, because the partsman, like the stenographer, would be working inside." (statement of Sen. Clark)). Nothing in the legislative record suggests that Congress thought that service advisors worked anything but ordinary business hours—to the extent that Congress thought about service advisors at all. *See* OOH at 314-17 (describing the work of service advisors without anywhere suggesting that they worked unusual hours).

The legislative history thus contains repeated, detailed concerns about applying the overtime-compensation requirement to automobile salesmen, partsmen, and mechanics. By contrast, Defendant does not direct us to any portion of the legislative history that reveals a similar concern for applying the overtime-compensation requirement to service advisors, and we have found none. To the contrary, the only references to service advisors that we have found suggest that dealerships had no concern about overtime compensation for service advisors.[18]

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[18] *See 1960 House Hearings* at 1393 (testimony by a Ford dealer from rural Louisiana, merely comparing the average pay at his

Viewed in light of the clear concerns about overtime compensation for automobile salesmen, partsmen, and mechanics, the legislative history's apparent silence on concerns about overtime pay for service advisors strongly suggests that Congress did not intend to exempt service advisors. If Congress meant for the exemption to encompass service advisors, we would expect that concern to be plain from—or at least mentioned in—the legislative record of the 1966 amendments.

In 1974, Congress amended paragraph (b)(10) to its present-day form. 29 U.S.C. § 213(b)(10) (2016); 88 Stat. at 61. The law created new subparagraph (b)(10)(A), which exempted "any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles, trucks, farm implements" and new subparagraph (b)(10)(B), which exempted "any salesman primarily engaged in selling trailers, boats, or aircraft."

Both the House and the Senate were provided with written summaries of the revised exemption. In the House, Representative Dent's report described the overall effect of the new § 213(b)(10)(A) & (B):

> Provides an overtime exemption for *any salesmen primarily engaged in selling*

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dealership with the average pay at dealerships in New Orleans for mechanics, painters, body repairmen, upholsterers, parts-department men, and "service salesmen [service advisors]"); *1959 Senate Hearings* at 208 (same); *1957 House Hearings* at 1188 (same); *1957 Senate Hearings* at 1160-61 (letter from the South Carolina Auto. Dealership Ass'n expressing no concern about paying overtime to its employees other than automobile salesmen and mechanics).

> *automobiles*, trailers, trucks, farm implements, boats, or aircraft if employed by a nonmanufacturing establishment primarily engaged in the business of selling such vehicles to ultimate purchasers. Also provides an overtime exemption for partsmen and mechanics of automobile, truck, and farm implement dealerships.

120 Cong. Rec. 8602 (1974) (emphasis added). That summary makes clear that "salesman" applies *only* to "selling" goods. There is no mention of salesmen primarily engaged in servicing automobiles, even though the literal terms of the exemption could encompass that category. Instead, the summary applied only the verb "selling" to the subject "salesman."

In the Senate, Senator Williams' report described the changes between the then-existing exemption and the new § 213(b)(10)(A) & (B):

> [A]mends section 13(b)(10) relating to salesmen, partsmen, and mechanics by repealing the overtime exemption for partsmen and mechanics in nonmanufacturing establishments primarily engaged in selling trailers; by repealing the overtime exemption for partsmen and mechanics in nonmanufacturing establishments engaged in selling aircraft; and by providing an overtime exemption for salesmen engaged in the sale of boats.

120 Cong. Rec. 8763 (1974). That summary also makes clear that "salesman" applies *only* to "selling" goods. Reviewing the words of the statute literally, as

Defendant urges us to do, the amendment also repealed the exemption for salesmen primarily engaged in servicing trailers and aircraft. But the summary does not mention such an effect, strongly suggesting that Congress did not think that "salesman" connected to "servicing." Thus, the summaries of the 1974 amendments before the House and the Senate both understood the exemption to encompass only salesmen "selling," not salesmen "servicing."

So, too, did the National Automobile Dealers Association. During hearings before subcommittees of the House and the Senate, the Association submitted a prepared statement that urged Congress not to change § 213(b)(10) as it applied to salesmen, partsmen, and mechanics at automobile dealerships.[19] The statement explained that Congress' 1966 creation of the exemption in § 213(b)(1) "was a recognition of the fact that these categories of employees work long hours during peak periods, but receive high commissions, and, accordingly should not be subject to overtime requirements." *1970 House Hearings* at 109, 259. To prove the high-pay assertion, the statement then detailed the average earnings of "*all car and truck* salesmen," "mechanics," and "partsmen." *Id.* (emphasis added). To prove that salesmen, mechanics, and partsmen work long hours, the statement described each position. The paragraph describing salesmen plainly refers to persons who sell cars, not to service advisors. *Id.* The statement summarized:

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[19] *To Amend the Fair Labor Standards Act: Hearings on H.R. 10948 and H.R. 17596 Before the Gen. Subcomm. on Labor of the H. Comm. on Educ. & Labor*, 91st Cong. 109-11, 259-61 (1970) ("*1970 House Hearings*"); *Fair Labor Standards Amendments of 1971: Hearings on S. 1861 and S. 2259 Before the Subcomm. on Labor of the Senate Comm. on Labor & Pub. Welfare*, 92nd Cong. 789-94 (1971) ("*1971 Senate Hearings*").

> The primary purpose of minimum wage and overtime legislation is to take care of people who receive substandard salaries. As already noted, *automobile salesmen* average $10,036 per year, automobile mechanics average $5.00 per hour and partsmen average $3.42 per hour.

Id. (emphasis added).

As with the 1966 amendments, Defendant has not pointed us to any passage of the legislative history suggesting that Congress intended to exempt service advisors, and we have found none. To the contrary, the only reference to service advisors that we have found suggests that Congress had no concern about overtime compensation for service advisors.[20]

In sum, the legislative history of the 1966 amendments and of the 1974 amendments reveal clear concerns with applying the overtime-compensation requirement to exactly three categories of a dealership's employees: automobile salesmen, partsmen, and mechanics. The extensive legislative record—tens of thousands of pages spanning a decade and a half—contains hardly a mention of service advisors, and the few references that exist display no concern about overtime compensation for service advisors. We are firmly persuaded that Congress did not intend to exempt service advisors.

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[20] We found only one portion of the legislative record that mentions a "service adviser." *1971 Senate Hearings* at 780-81. That testimony merely described what a service advisor does; it does not suggest that the exemption applied to service advisors. *Id.*

C. Conclusion

After a thorough, de novo review of congressional intent, we hold that the exemption in § 213(b)(10)(A) does not encompass service advisors. We acknowledge that our holding conflicts with published decisions by the Fourth and Fifth Circuits and by the Supreme Court of Montana. *Walton v. Greenbrier Ford, Inc.*, 370 F.3d 446 (4th Cir. 2004); *Brennan v. Deel Motors, Inc.*, 475 F.2d 1095 (5th Cir. 1973); *Thompson v. J.C. Billion, Inc.*, 294 P.3d 397 (Mont. 2013). We are unpersuaded by the analysis of those decisions for the reasons stated above and for the reasons stated in our earlier opinion (except those reasons concerning deference to the agency). *Navarro*, 780 F.3d at 1274-77.

This opinion addresses only Plaintiffs' federal claim for overtime compensation. For the reasons given in our earlier opinion, *id.* at 1270 n.2, we affirm the dismissal of all other federal claims, and we reverse the dismissal of the state-law claims.

AFFIRMED in part, REVERSED in part, and REMANDED. Costs on appeal awarded to Plaintiffs-Appellants.

Appendix B

SUPREME COURT OF THE UNITED STATES

No. 15-415

ENCINO MOTORCARS, LLC,
Petitioner,
v.
HECTOR NAVARRO, et al.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Decided: June 20, 2016

OPINION

JUSTICE KENNEDY delivered the opinion of the Court.

This case addresses whether a federal statute requires payment of increased compensation to certain automobile dealership employees for overtime work. The federal statute in question is the Fair Labor Standards Act (FLSA), 29 U.S.C. § 201 *et seq.*, enacted in 1938 to "protect all covered workers from substandard wages and oppressive working hours." *Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728, 739 (1981). Among its other provisions, the

FLSA requires employers to pay overtime compensation to covered employees who work more than 40 hours in a given week. The rate of overtime pay must be "not less than one and one-half times the regular rate" of the employee's pay. § 207(a).

Five current and former service advisors brought this suit alleging that the automobile dealership where they were employed was required by the FLSA to pay them overtime wages. The dealership contends that the position and duties of a service advisor bring these employees within § 213(b)(10)(A), which establishes an exemption from the FLSA overtime provisions for certain employees engaged in selling or servicing automobiles. The case turns on the interpretation of this exemption.

I

A

Automobile dealerships in many communities not only sell vehicles but also sell repair and maintenance services. Among the employees involved in providing repair and maintenance services are service advisors, partsmen, and mechanics. Service advisors interact with customers and sell them services for their vehicles. A service advisor's duties may include meeting customers; listening to their concerns about their cars; suggesting repair and maintenance services; selling new accessories or replacement parts; recording service orders; following up with customers as the services are performed (for instance, if new problems are discovered); and explaining the repair and maintenance work when customers return for their vehicles. *See* App. 40-41; *see also Brennan v. Deel Motors, Inc.*, 475 F.2d 1095, 1096 (CA5 1973); 29 CFR

§ 779.372(c)(4) (1971). Partsmen obtain the vehicle parts needed to perform repair and maintenance and provide those parts to the mechanics. *See* § 779.372(c)(2). Mechanics perform the actual repair and maintenance work. *See* § 779.372(c)(3).

In 1961, Congress enacted a blanket exemption from the FLSA's minimum wage and overtime provisions for all automobile dealership employees. Fair Labor Standards Amendments of 1961, § 9, 75 Stat. 73. In 1966, Congress repealed that broad exemption and replaced it with a narrower one. The revised statute did not exempt dealership employees from the minimum wage requirement. It also limited the exemption from the overtime compensation requirement to cover only certain employees—in particular, "any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles, trailers, trucks, farm implements, or aircraft" at a covered dealership. Fair Labor Standards Amendments of 1966, § 209, 80 Stat. 836. Congress authorized the Department of Labor to "promulgate necessary rules, regulations, or orders" with respect to this new provision. § 602, *id.*, at 844.

The Department exercised that authority in 1970 and issued a regulation that defined the statutory terms "salesman," "partsman," and "mechanic." 35 Fed. Reg. 5896 (1970) (codified at 29 CFR § 779.372(c)). The Department intended its regulation as a mere interpretive rule explaining its own views, rather than a legislative rule with the force and effect of law; and so the Department did not issue the regulation through the notice-and-comment procedures of the Administrative Procedure Act. *See*

35 Fed. Reg. 5856; *see also* 5 U.S.C. § 553(b)(A) (exempting interpretive rules from notice and comment).

The 1970 interpretive regulation defined "salesman" to mean "an employee who is employed for the purpose of and is primarily engaged in making sales or obtaining orders or contracts for sale of the vehicles or farm implements which the establishment is primarily engaged in selling." 29 CFR § 779.372(c)(1) (1971). By limiting the statutory term to salesmen who sell vehicles or farm implements, the regulation excluded service advisors from the exemption, since a service advisor sells repair and maintenance services but not the vehicle itself. The regulation made that exclusion explicit in a later subsection: "Employees variously described as service manager, service writer, service advisor, or service salesman . . . are not exempt under [the statute]. This is true despite the fact that such an employee's principal function may be disagnosing [*sic*] the mechanical condition of vehicles brought in for repair, writing up work orders for repairs authorized by the customer, assigning the work to various employees and directing and checking on the work of mechanics." § 779.372(c)(4).

Three years later, the Court of Appeals for the Fifth Circuit rejected the Department's conclusion that service advisors are not covered by the statutory exemption. *Deel Motors, supra.* Certain District Courts followed that precedent. *See Yenney v. Cass County Motors*, 81 CCH LC ¶ 33,506 (Neb. 1977); *Brennan v. North Bros. Ford, Inc.*, 76 CCH LC ¶ 33,247 (ED Mich. 1975), *aff'd sub nom. Dunlop v.*

North Bros. Ford, Inc., 529 F.2d 524 (CA6 1976) (table); *Brennan v. Import Volkswagen, Inc.*, 81 CCH LC ¶ 33,522 (Kan. 1975).

In the meantime, Congress amended the statutory provision by enacting its present text, which now sets out the exemption in two subsections. Fair Labor Standards Amendments of 1974, § 14, 88 Stat. 65. The first subsection is at issue in this case. It exempts "any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles, trucks, or farm implements" at a covered dealership. 29 U.S.C. § 213(b)(10)(A). The second subsection exempts "any salesman primarily engaged in selling trailers, boats, or aircraft" at a covered dealership. § 213(b)(10)(B). The statute thus exempts certain employees engaged in servicing automobiles, trucks, or farm implements, but not similar employees engaged in servicing trailers, boats, or aircraft.

In 1978, the Department issued an opinion letter departing from its previous position. Taking a position consistent with the cases decided by the courts, the opinion letter stated that service advisors could be exempt under § 213(b)(10)(A). Dept. of Labor, Wage & Hour Div., Opinion Letter No. 1520 (WH-467) (1978), [1978-1981 Transfer Binder] CCH Wages-Hours Administrative Rulings ¶ 31,207. The letter acknowledged that the Department's new policy "represent[ed] a change from the position set forth in section 779.372(c)(4)" of its 1970 regulation. In 1987, the Department confirmed its 1978 interpretation by amending its Field Operations Handbook to clarify that service advisors should be treated as exempt under § 213(b)(10)(A). It observed that some courts had interpreted the statutory exemption to cover service advisors; and it stated that, as a result of those decisions, it would "no longer deny the [overtime] exemption for such employees." Dept. of Labor, Wage & Hour Div., Field Operations Handbook, Insert No. 1757, 24L04-4(k)(Oct. 20, 1987), online at https://perma.cc/5GHD-KCJJ (all Internet materials as last visited June 16, 2016). The Department again acknowledged that its new position represented a change from its 1970 regulation and stated that the regulation would "be revised as soon as is practicable." *Ibid.*

Twenty-one years later, in 2008, the Department at last issued a notice of proposed rulemaking. 73 Fed. Reg. 43654. The notice observed that every court that had considered the question had held service advisors to be exempt under § 213(b)(10)(A), and that the Department itself had treated service advisors as exempt since 1987. *Id.*, at 43658-43659. The Department proposed to revise its regulations to accord with existing practice by interpreting the exemption in § 213(b)(10)(A) to cover service advisors.

In 2011, however, the Department changed course yet again. It announced that it was "not proceeding with the proposed rule." 76 Fed. Reg. 18833. Instead, the Department completed its 2008 notice-and-comment rulemaking by issuing a final rule that took the opposite position from the proposed rule. The new final rule followed the original 1970 regulation and interpreted the statutory term "salesman" to mean only an employee who sells automobiles, trucks, or farm implements. *Id.*, at 18859 (codified at 29 CFR § 779.372(c)(1)).

The Department gave little explanation for its decision to abandon its decades-old practice of treating service advisors as exempt under § 213(b)(10)(A). It was also less than precise when it issued its final rule. As described above, the 1970 regulation included a separate subsection stating in express terms that service advisors "are not exempt" under the relevant provision. 29 CFR § 779.372(c)(4) (1971). In promulgating the 2011 regulation, however, the Department eliminated that separate subsection. According to the United States, this change appears to have been "an inadvertent mistake in drafting." Tr. of Oral Arg. 50.

B

Petitioner is a Mercedes-Benz automobile dealership in the Los Angeles area. Respondents are or were employed by petitioner as service advisors. They assert that petitioner required them to be at work from 7 a.m. to 6 p.m. at least five days per week, and to be available for work matters during breaks and while on vacation. App. 39-40. Respondents were not paid a fixed salary or an hourly wage for their work; instead, they were paid commissions on the services they sold. *Id.*, at 40-41.

Respondents sued petitioner in the United States District Court for the Central District of California, alleging that petitioner violated the FLSA by failing to pay them overtime compensation when they worked more than 40 hours in a week. *Id.*, at 42-44. Petitioner moved to dismiss, arguing that the FLSA overtime provisions do not apply to respondents because service advisors are covered by the statutory exemption in

§ 213(b)(10)(A). The District Court agreed and granted the motion to dismiss.

The Court of Appeals for the Ninth Circuit reversed in relevant part. It construed the statute by deferring under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), to the interpretation set forth by the Department in its 2011 regulation. Applying that deference, the Court of Appeals held that service advisors are not covered by the § 213(b)(10)(A) exemption. 780 F.3d 1267 (2015). The Court of Appeals recognized, however, that its decision conflicted with cases from a number of other courts. *Id.*, at 1274 (citing, *inter alia, Walton v. Greenbrier Ford, Inc.*, 370 F.3d 446 (CA4 2004); *Deel Motors*, 475 F.2d 1095; *Thompson v. J. C. Billion, Inc.*, 368 Mont. 299, 294 P. 3d 397 (2013)). This Court granted certiorari to resolve the question. 577 U.S. ___ (2016).

II

A

The full text of the statutory subsection at issue states that the overtime provisions of the FLSA shall not apply to:

> "any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles, trucks, or farm implements, if he is employed by a nonmanufacturing establishment primarily engaged in the business of selling such vehicles or implements to ultimate purchasers." § 213(b)(10)(A).

The question presented is whether this exemption should be interpreted to include service advisors. To resolve that question, it is necessary to determine what deference, if any, the courts must give to the Department's 2011 interpretation.

In the usual course, when an agency is authorized by Congress to issue regulations and promulgates a regulation interpreting a statute it enforces, the interpretation receives deference if the statute is ambiguous and if the agency's interpretation is reasonable. This principle is implemented by the two-step analysis set forth in *Chevron*. At the first step, a court must determine whether Congress has "directly spoken to the precise question at issue." 467 U.S., at 842. If so, "that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id.*, at 842-843. If not, then at the second step the court must defer to the agency's interpretation if it is "reasonable." *Id.*, at 844.

A premise of *Chevron* is that when Congress grants an agency the authority to administer a statute by issuing regulations with the force of law, it presumes the agency will use that authority to resolve ambiguities in the statutory scheme. *See id.*, at 843-844; *United States v. Mead Corp.*, 533 U.S. 218, 229-230 (2001). When Congress authorizes an agency to proceed through notice-and-comment rulemaking, that "relatively formal administrative procedure" is a "very good indicator" that Congress intended the regulation to carry the force of law, so *Chevron* should apply. *Mead Corp.*, *supra*, at 229-230. But *Chevron* deference is not warranted where the regulation is "procedurally defective"—that is, where the agency errs by failing to follow the correct procedures in issuing the regulation. 533 U.S., at 227; *cf. Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 174-176 (2007) (rejecting challenge to procedures by which regulation was issued and affording *Chevron* deference). Of course, a party might be foreclosed in some instances from challenging the procedures used to promulgate a given rule. *Cf., e.g., JEM Broadcasting Co. v. FCC*, 22 F.3d 320, 324-326 (CADC 1994); *cf. also Auer v. Robbins*, 519 U.S. 452, 458-459 (1997) (party cannot challenge agency's failure to amend its rule in light of changed circumstances without first seeking relief from the agency). But where a proper challenge is raised to the agency procedures, and those procedures are defective, a court should not accord *Chevron* deference to the agency interpretation. Respondents do not contest the manner in which petitioner has challenged the agency procedures here, and so this opinion assumes without deciding that the challenge was proper.

One of the basic procedural requirements of administrative rulemaking is that an agency must give adequate reasons for its decisions. The agency "must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29, 43 (1983) (internal quotation marks omitted). That requirement is satisfied when the agency's explanation is clear enough that its "path may reasonably be discerned." *Bowman Transp., Inc. v. Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 286 (1974). But where the agency has failed to provide even that minimal level of analysis, its action is arbitrary and capricious and so cannot carry the force of law. *See* 5 U.S.C. § 706(2)(A); *State Farm*, *supra*, at 42-43.

Agencies are free to change their existing policies as long as they provide a reasoned explanation for the change. *See*, *e.g.*, *National Cable & Telecommunications Assn. v. Brand X Internet Services*, 545 U.S. 967, 981-982 (2005); *Chevron*, 467 U.S., at 863-864. When an agency changes its existing position, it "need not always provide a more detailed justification than what would suffice for a new policy created on a blank slate." *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009). But the agency must at least "display awareness that it is changing position" and "show that there are good reasons for the new policy." *Ibid.* (emphasis deleted). In explaining its changed position, an agency must also be cognizant that long standing policies may have "engendered serious reliance interests that must be taken into account." *Ibid.*; *see also Smiley v. Citibank (South Dakota), N. A.*, 517 U.S. 735, 742 (1996). "In such cases it is not that further justification is demanded by the mere fact of policy change; but that a reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by the prior policy." *Fox Television Stations*, *supra*, at 515-516. It follows that an "[u]nexplained inconsistency" in agency policy is "a reason for holding an interpretation to be an arbitrary and capricious change from agency practice." *Brand X*, *supra*, at 981. An arbitrary and capricious regulation of this sort is itself unlawful and receives no *Chevron* deference. *See Mead Corp., supra*, at 227.

B

Applying those principles here, the unavoidable conclusion is that the 2011 regulation was issued without the reasoned explanation that was required in light of the Department's change in position and the significant reliance interests involved. In promulgating the 2011 regulation, the Department offered barely any explanation. A summary discussion may suffice in other circumstances, but here—in particular because of decades of industry reliance on the Department's prior policy—the explanation fell short of the agency's duty to explain why it deemed it necessary to overrule its previous position.

The retail automobile and truck dealership industry had relied since 1978 on the Department's position that service advisors are exempt from the FLSA's overtime pay requirements. *See* National Automobile Dealers Association, Comment Letter on Proposed Rule Updating Regulations Issued Under the Fair Labor Standards Act (Sept. 26, 2008), online at https://www.regulations.gov/#!documentDetail;D=WHD-2008-0003-0038. Dealerships and service advisors negotiated and structured their compensation plans against this background understanding. Requiring dealerships to adapt to the Department's new position could necessitate systemic, significant changes to the dealerships' compensation arrangements. *See* Brief for National Automobile Dealers Association et al. as *Amici Curiae* 13-14. Dealerships whose service advisors are not compensated in accordance with the Department's new views could also face substantial FLSA liability, *see* 29 U.S.C. § 216(b), even if this risk of liability may be diminished in some cases by the existence of a separate FLSA exemption for certain employees paid on a commission basis, *see* § 207(i), and even if a dealership could defend against retroactive liability by showing it relied in good faith on the prior agency position, *see* § 259(a). In light of this background, the Department needed a more reasoned explanation for its decision to depart from its existing enforcement policy.

The Department said that, in reaching its decision, it had "carefully considered all of the comments, analyses, and arguments made for and against the proposed changes." 76 Fed. Reg. 18832. And it noted that, since 1978, it had treated service advisors as exempt in certain circumstances. *Id.*, at 18838. It also noted the comment from the National Automobile Dealers Association stating that the industry had relied on that interpretation. *Ibid.*

But when it came to explaining the "good reasons for the new policy," *Fox Television Stations*, *supra*, at 515, the Department said almost nothing. It stated only that it would not treat service advisors as exempt because "the statute does not include such positions and the Department recognizes that there are circumstances under which the requirements for the exemption would not be met." 76 Fed. Reg. 18838. It continued that it "believes that this interpretation is reasonable" and "sets forth the appropriate approach." *Ibid.* Although an agency may justify its policy choice by explaining why that policy "is more consistent with statutory language" than alternative policies, *Long*

Island Care at Home, 551 U.S., at 175 (internal quotation marks omitted), the Department did not analyze or explain why the statute should be interpreted to exempt dealership employees who sell vehicles but not dealership employees who sell services (that is, service advisors). And though several public comments supported the Department's reading of the statute, the Department did not explain what (if anything) it found persuasive in those comments beyond the few statements above.

It is not the role of the courts to speculate on reasons that might have supported an agency's decision. "[W]e may not supply a reasoned basis for the agency's action that the agency itself has not given." *State Farm*, 463 U.S., at 43 (citing *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947)). Whatever potential reasons the Department might have given, the agency in fact gave almost no reasons at all. In light of the serious reliance interests at stake, the Department's conclusory statements do not suffice to explain its decision. *See Fox Television Stations*, 556 U.S., at 515-516. This lack of reasoned explication for a regulation that is inconsistent with the Department's longstanding earlier position results in a rule that cannot carry the force of law. *See* 5 U.S.C. § 706(2)(A); *State Farm*, *supra*, at 42-43. It follows that this regulation does not receive *Chevron* deference in the interpretation of the relevant statute.

* * *

For the reasons above, § 213(b)(10)(A) must be construed without placing controlling weight on the Department's 2011 regulation. Because the decision below relied on *Chevron* deference to this regulation, it is appropriate to remand for the Court of Appeals to interpret the statute in the first instance. *Cf. Mead*, 533 U.S., at 238-239. The judgment of the Court of Appeals is vacated, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE GINSBURG with whom JUSTICE SOTOMAYOR joins, concurring.

I agree in full that, in issuing its 2011 rule, the Department of Labor did not satisfy its basic obligation to explain "that there are good reasons for [a] new policy." *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009). The Department may have adequate reasons to construe the Fair Labor Standards Act automobile-dealership exemption as it did. The 2011 rulemaking tells us precious little, however, about what those reasons are.[1]

I write separately to stress that nothing in today's opinion disturbs well-established law. In particular, where an agency has departed from a prior position, there is no "heightened standard" of arbitrary-and-capricious review. *Id.*, at 514. *See also ante*, at 9. An agency must "display awareness that it is changing position" and "show that there are good reasons for the new policy." *Fox*, 556 U.S., at 515 (emphasis deleted). "But it need not demonstrate to a court's satisfaction that the reasons for the new policy are *better* than the reasons for the old one; it suffices that the new policy is permissible under the statute, that there are good reasons for it, and that the agency *believes* it to be better, which the conscious change of course adequately indicates." *Ibid.*

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[1] Unlike Justice Thomas, I am not persuaded that, sans *Chevron*, the Ninth Circuit should conclude on remand that service advisors are categorically exempt from hours regulations. As that court previously explained, "[s]ervice advisors may be 'salesmen' in a generic sense, but they [may fall outside the exemption because they] do not personally sell cars and they do not personally service cars." 780 F.3d 1267, 1274 (2015). Moreover, in its briefing before this Court, the Department of Labor responded to the argument that "the exemption's application to a 'partsman'" "confirm[s] that a service advisor is a salesman primarily engaged in servicing automobiles." *Post,* at 3-4 (Thomas, J, dissenting). *See* Brief for United States as *Amicus Curiae* 22-23 (maintaining that partsmen, unlike service advisors, actually engage in maintenance and repair work); Brief for Respondents 11 (contending that partsmen "ge[t] their hands dirty" by "work[ing] as a mechanic's right-hand man or woman"); *id.,* at 32-35 (cataloguing descriptions of partsmen responsibilities drawn from occupational handbooks and training manuals). The Court appropriately leaves the proper ranking of service advisors to the Court of Appeals in the first instance.

The Court's bottom line remains unaltered: "'[U]nexplained inconsistency' in agency policy is 'a reason for holding an interpretation to be an arbitrary and capricious change from agency practice.'" *Ante*, at 10 (quoting *National Cable & Telecommunications Assn. v. Brand X Internet Services*, 545 U.S. 967, 981 (2005)). Industry reliance may spotlight the inadequacy of an agency's explanation. *See ante*, at 10 ("decades of industry reliance" make "summary discussion" inappropriate). But reliance does not overwhelm good reasons for a policy change. Even if the Department's changed position would "necessitate systemic, significant changes to the dealerships' compensation arrangements," *ante*, at 10, the Department would not be disarmed from determining that the benefits of overtime coverage outweigh those costs.[2] "If the action rests upon . . . an exercise of judgment in an area which Congress has entrusted to the agency[,] of course it must not be set aside because the reviewing court might have made a different determination were it empowered to do so." *SEC v. Chenery Corp.*, 318 U.S. 80, 94 (1943).

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[2] If the Department decides to reissue the 2011 rule, I doubt that reliance interests would pose an insurmountable obstacle. As the Court acknowledges, *ante*, at 11, an affirmative defense in the Fair Labor Standards Act (FLSA) protects regulated parties against retroactive liability for actions taken in good-faith reliance on superseded agency guidance, 29 U.S.C. § 259(a). And

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a separate FLSA exemption covers many service advisors: retail or service workers who receive at least half of their pay on commission, so long as their regular rate of pay is more than 1½ times the minimum wage. *Ante*, at 11 (citing § 207(i)); *see* Brief for Petitioner 13, n. 4 (many service advisors are paid on a commission basis). Thus, the cost of the Department's policy shift may be considerably less than the dealerships project. Finally, I note, the extent to which the Department is obliged to address reliance will be affected by the thoroughness of public comments it receives on the issue. In response to its 2008 proposal, the Department received only conclusory references to industry reliance interests. *See ante*, at 10 (citing comment from National Automobile Dealers Association). An agency cannot be faulted for failing to discuss at length matters only cursorily raised before it.

JUSTICE THOMAS, with whom JUSTICE ALITO joins, dissenting.

The Court granted this case to decide whether an exemption under the Fair Labor Standards Act (FLSA), 29 U.S.C. § 201 *et seq.*, "requires payment of increased compensation to certain automobile dealership employees"—known as service advisors—"for overtime work." *Ante*, at 1; *see also ante*, at 2, 7. The majority declines to resolve that question. Instead, after explaining why the Court owes no deference to the Department of Labor's regulation purporting to interpret this provision, *see Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984), the majority leaves it "for the Court of Appeals to interpret the statute in the first instance." *Ante*, at 12.

I agree with the majority's conclusion that we owe no *Chevron* deference to the Department's position because "deference is not warranted where [a] regulation is 'procedurally defective.'" *Ante*, at 8. But I disagree with its ultimate decision to punt on the issue before it. We have an "obligation . . . to decide the merits of the question presented." *CBOCS West, Inc. v. Humphries*, 553 U.S. 442, 472 (2008) (Thomas, J., dissenting). We need not wade into the murky waters of *Chevron* deference to decide whether the Ninth Circuit's reading of the statute was correct. We must instead examine the statutory text. That text reveals that service advisors are salesmen primarily engaged in the selling of services for automobiles. Accordingly, I would reverse the Ninth Circuit's judgment.

Federal law requires overtime pay for certain employees who work more than 40 hours per week.

§ 207(a)(2)(C). But the FLSA exempts various categories of employees from this overtime requirement. § 213. The question before the Court is whether the following exemption encompasses service advisors:

> "The provisions of section 207 of this title shall not apply with respect to—
>
> . . . . .
>
> "(10)(A) any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles, trucks, or farm implements, if he is employed by a nonmanufacturing establishment primarily engaged in the business of selling such vehicles or implements to ultimate purchasers." § 213(b).

I start with the uncontroversial notion that a service advisor is a "salesman." The FLSA does not define the term "salesman," so "we give the term its ordinary meaning." *Taniguchi v. Kan Pacific Saipan, Ltd.*, 566 U.S. ___, ___ (2012) (slip op., at 5). A "salesman" is someone who sells goods or services. 14 Oxford English Dictionary 391(2d ed. 1989) ("[a] man whose business it is to sell goods or conduct sales"); Random House Dictionary of the English Language 1262 (1966) (Random House) ("a man who sells goods, services, etc."). Service advisors, whose role it is to "interact with customers and sell them services for their vehicles," *ante,* at 2, are plainly "salesm[e]n." *See ibid.* (cataloguing sales-related duties of service advisors).

A service advisor, however, is not "primarily engaged in selling . . . automobiles." § 213(b)(10)(A).

On the contrary, a service advisor is a "salesman" who sells servicing solutions. *Ante,* at 2. So the exemption applies only if it covers *not only* those salesmen primarily engaged in selling automobiles *but also* those salesmen primarily engaged in servicing automobiles.

The exemption's structure confirms that salesmen could do both. The exemption contains three nouns ("salesman, partsman, or mechanic") and two gerunds ("selling or servicing"). The three nouns are connected by the disjunctive "or," as are the gerunds. So unless context dictates otherwise, a salesman can *either* be engaged in selling *or* servicing automobiles. *Cf. Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979).

Context does not dictate otherwise. A salesman, namely, one who sells servicing solutions, can be "primarily engaged in . . . servicing automobiles." § 213(b)(10)(A). The FLSA does not define the term "servicing," but its ordinary meaning includes both "[t]he action of maintaining or repairing a motor vehicle" and "the action of providing a service." 15 Oxford English Dictionary 39; see also Random House 1304 (defining "service" to mean "the providing . . . of . . . activities required by the public, as maintenance, repair, etc."). A service advisor's selling of service solutions fits both definitions. The service advisor is the customer's liaison for purposes of deciding what parts are necessary to maintain or repair a vehicle, and therefore is primarily engaged in "the action of maintaining or repairing a motor vehicle" or "the action of providing a service" for an automobile.

Other features of the exemption confirm that a service advisor is a salesman primarily engaged in servicing automobiles. Consider the exemption's application to a "partsman." Like a service advisor, a partsman neither sells vehicles nor repairs vehicles himself. *See* 29 CFR § 779.372(c)(2) (2015) (defining "partsman" as "any employee employed for the purpose of and primarily engaged in requisitioning, stocking, and dispensing parts"). For the provision to exempt partsmen, then, the phrase "primarily engaged in . . . servicing" must cover some employees who do not themselves perform repair or maintenance. So "servicing" refers not only to the physical act of repairing or maintaining a vehicle but also to acts integral to the servicing process more generally.

Respondents' contrary contentions are unavailing. They first invoke the distributive canon: "Where a sentence contains several antecedents and several consequents," the distributive canon instructs courts to "read [those several terms] distributively and apply the words to the subjects which, by context, they seem most properly to relate." 2A N. Singer & S. Singer, Sutherland on Statutory Construction § 47.26, on p. 448 (rev. 7th ed. 2014). Respondents accordingly maintain that 29 U.S.C. § 213(b)(10)(A) exempts *only* salesmen primarily engaged in selling automobiles. Brief for Respondents 20-26. But the distributive canon is less helpful in cases such as this because the antecedents and consequents cannot be readily matched on a one-to-one basis. Here, there are three nouns to be matched with only two gerunds, so the canon does not overcome the exemption's plain meaning. Perhaps respondents might have a better argument if the statute exempted "salesman or mechanics who primarily engage in selling or servicing automobiles." In such a case, one might assume that Congress meant the nouns and gerunds to match on a one-to-one basis, and the distributive canon could be utilized to determine how the matching should occur. But that is not the statute before us. For the reasons explained, *supra,* at 3-4, the plain meaning of the various terms in the exemption establish that the term "salesman" is not limited to only those who sell automobiles. It also extends to those "primarily engaged in . . . servicing automobiles." § 213(b)(10)(A).

Respondents also resist this natural reading of the exemption by invoking the made-up canon that courts must narrowly construe the FLSA exemptions. Brief for Respondents 41-42. The Ninth Circuit agreed with respondents on this score. 780 F.3d 1267, 1271-1272, n. 3 (2015). The court should not do so again on remand. We have declined to apply that canon on two recent occasions, one of which also required the Court to parse the meaning of an exemption in § 213. *Christopher v. SmithKline Beecham Corp.*, 567 U.S. ___, ___-___, n. 21 (2012) (slip op., at 19-20, n. 21); *see also Sandifer v. United States Steel Corp.*, 571 U.S. ___, ___, n. 7 (2014) (slip op., at 11, n. 7). There is no basis to infer that Congress means anything beyond what a statute plainly says simply because the legislation in question could be classified as "remedial." *See* Scalia, Assorted Canards of Contemporary Legal Analysis, 40 Case W. Res. L. Rev. 581, 581-586 (1990).Indeed, this canon appears to "res[t] on an elemental misunderstanding of the legislative process," viz., "that Congress intend[s] statutes to extend as far as possible in service of a singular objective." Brief for Chamber of Commerce of the United States of America et al. as *Amici Curiae* 7.

* * *

For the foregoing reasons, I would hold that the FLSA exemption set out in § 213(b)(10)(A) covers the service advisors in this case. Service advisors are "primarily engaged in . . . servicing automobiles," given their integral role in selling and providing vehicle services. Accordingly, I would reverse the judgment of the Ninth Circuit.

Appendix C

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 13-55323

HECTOR NAVARRO; ANTHONY PINKINS; KEVIN MALONE;
AND REUBEN CASTRO,

Plaintiffs-Appellants,

v.

ENCINO MOTORCARS, LLC, ERRONEOUSLY SUED AS
MERCEDES BENZ OF ENCINO, A CORPORATION,

Defendant-Appellee.

Argued: February 11, 2015
Filed: March 24, 2015

Before: Susan P. Graber and
Kim McLane Wardlaw, Circuit Judges,
and James C. Mahan,[*] District Judge.

OPINION

GRABER, Circuit Judge:

We consider here a question of first impression for our circuit: Are "service advisors" who work at a car dealership exempt from the overtime pay requirements of the Fair Labor Standards Act (FLSA) of 1938, 29 U.S.C. §§ 201-219, under 29 U.S.C. § 213(b)(10)(A), which exempts "any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles"? Reviewing de novo, *Fortyune v. City of Lomita*, 766 F.3d 1098, 1101 (9th Cir. 2014), *petition for cert. filed*, __U.S.L.W.__ (U.S. Jan. 26, 2015) (No. 14-920), we answer that question "no" and, accordingly, reverse the district court's holding to the contrary.

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[*] The Honorable James C. Mahan, United States District Judge for the District of Nevada. sitting by designation.

FACTUAL AND PROCEDURAL HISTORY

Defendant Encino Motorcars, LLC, sells and services new and used Mercedes-Benz automobiles.[1] Defendant employed or employs Plaintiffs Hector Navarro, Mike Shirinian, Anthony Pinkins, Kevin Malone, and Reuben Castro as "service advisors." The complaint alleges:

> The job duties and obligations of Service Advisors . . . are to meet and greet Mercedes Benz owners as they enter the service area of the dealership and then to evaluate the service and/or repair needs of the vehicle owner in light of complaints given them by these vehicle owners. Upon evaluation of the service deeds of the vehicle, the Service Advisors ... then solicit and suggest[] that certain service[s] be conducted on the vehicle

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[1] Because the district court dismissed this case under Federal Rule of Civil Procedure 12(b)(6), we take the facts alleged in the complaint as true. *Brown v. Elec. Arts, Inc.*, 724 F.3d 1235, 1247 (9th Cir. 2013).

> to remedy the complaints of the vehicle owner by conducting certain repairs at [Defendant's dealership] and through [Defendant's] own mechanics. The Service Advisors ... are also duty bound and obligated by [Defendant] to solicit and suggest that supplemental service be performed on the vehicle above and beyond that which is required in response to the initial complaints of the vehicle owner. The Service Advisors . . . then write up an estimate for the repairs and services and provide[] that to the vehicle owner. The vehicle is then taken to the mechanics at [Defendant] for repair and maintenance.
>
> As required by [Defendant] and oftentimes while the vehicle is with [Defendant's] mechanics, the Service Advisors . . . will then call the vehicle owner and solicit and suggest that additional work be performed on the vehicle at additional cost.

Defendant pays service advisors on a commission basis only; Plaintiffs receive neither an hourly wage nor a salary.

In 2012, Plaintiffs filed this action alleging, among other things, that Defendant has violated the FLSA by failing to pay overtime wages. The district court dismissed the overtime claim because, the court concluded, Plaintiffs fall within the FLSA's exemption for "any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles." 29 U.S.C. § 213(b)(10)(A). Plaintiffs timely appeal.[2]

DISCUSSION

Title 29 U.S.C. § 207(a)(1) requires that employers pay time-and-a-half for hours worked in excess of 40 per workweek. But § 213(b)(10)(A) provides that "[t]he provisions of section 207 of this title shall not apply with respect to . . . any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles, trucks, or farm implements, if he is employed by a nonmanufacturing establishment primarily engaged in the business of selling such vehicles or implements to ultimate purchasers." Defendant, as a car dealership, is a "nonmanufacturing establishment primarily engaged in the business of selling . . . vehicles . . . to ultimate purchasers." *Id.* The question is whether each Plaintiff is a "salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles." *Id.*

Plaintiffs argue that we must defer to the United States Department of Labor's 2011 regulatory definitions, set out at 29 C.F.R. § 779.372(c). 76 Fed. Reg. 18,832-01 (Apr. 5, 2011). Those regulations state, in relevant part:

> Salesman, partsman, or mechanic.

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[2] The court dismissed Plaintiffs' other federal claims (claims 3, 5, and 7) on alternative grounds not challenged on appeal. For that reason, we affirm the court's dismissal of those claims. The court also exercised its discretion under 28 U.S.C. § 1367(c) to dismiss Plaintiffs' state-law claims for lack of supplemental jurisdiction. Because we reverse the dismissal of the overtime claim (claim I), we also reverse the dismissal of the state-law claims.

> (1) As used in section 13(b)(10)(A), a salesman is an employee who is employed for the purpose of and is primarily engaged in making sales or obtaining orders or contracts for sale of the automobiles, trucks, or farm implements that the establishment is primarily engaged in selling . . . .
>
> (2) As used in section 13(b)(10)(A), a partsman is any employee employed for the purpose of and primarily engaged in requisitioning, stocking, and dispensing parts.
>
> (3) As used in section 13(b)(10)(A), a mechanic is any employee primarily engaged in doing mechanical work (such as get ready mechanics, automotive, truck, or farm implement mechanics, used car reconditioning mechanics, and wrecker mechanics) in the servicing of an automobile, truck or farm implement for its use and operation as such . . . .

29 C.F.R. § 779.372(c). As the agency explained in 2011, the regulatory definitions "limit[] the exemption to salesmen who sell vehicles and partsmen and mechanics who service vehicles." 76 Fed. Reg. at 18,838. Because Plaintiffs do not fit within any of those definitions, they are not exempt from the FLSA's overtime wage provisions. Defendant concedes that Plaintiffs do not meet the regulatory definitions, but counters that we should not defer to the regulation.

We conduct the familiar two-step inquiry to determine whether to defer to the agency's interpretation. *McMaster v. United States*, 731 F.3d

881, 889 (9th Cir. 2013), *cert. denied*, 135 S. Ct. 160 (2014). "At step one, we ask 'whether Congress has directly spoken to the precise question at issue.'" *Id.* (quoting *Chevron, U.S.A, Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984)). If so, then the inquiry is over, and we must give effect to the "unambiguously expressed intent of Congress." *Chevron*, 467 U.S. at 843. But if the statute is silent or ambiguous, then we must determine, before step two, what level of deference applies. *McMaster*, 731 F.3d at 889. "If we determine that *Chevron* deference applies, then we move to step two, where we will defer to the agency's interpretation if it is 'based on permissible construction of the statute'". *Id.* (quoting *Chevron*, 467 U.S. at 843).

A. At *Chevron* Step One, the Statute is Ambiguous.

When construing a congressional enactment, "our inquiry begins with the statutory text." *BedRoc Ltd. v. United States*, 541. U.S. 176, 183 (2004). In addition, in the present context we must apply the background rule that "[t]he FLSA is to be construed liberally in favor of employees; exemptions are narrowly construed against employers." *Haro v. City of Los Angeles*, 745 F.3d 1249, 1256 (9th Cir.), *cert. denied*, 135 S. Ct. 138 (2014). "FLSA exemptions . . . are to be withheld except as to persons plainly and unmistakably within their terms and spirit."[3] *Solis v.*

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[3] The rule that courts should construe the FLSA's exemptions narrowly originated in *Arnold v. Ben Kanowsky, Inc.*, 361 U.S. 388, 392 (1960). In recent years, the Supreme Court has clarified that the presumption applies only to the exemptions in § 213 and not more generally. *Sandifer v. U.S. Steel Corp.*, 134 S. Ct. 870,

Washington, 656 F.3d 1079, 1083 (9th Cir. 2011) (internal quotation marks omitted). "An employer who claims an exemption from the FLSA bears the burden of demonstrating that such an exemption applies." *Id.* (internal quotation marks omitted).

As noted, the statute exempts "any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles." 29 U.S.C. § 213(b)(10)(A). The statute does not define the terms "salesman, partsman, or mechanic." Examining the statutory text and applying canons of statutory interpretation, we cannot conclude that service advisors such as Plaintiffs are "persons plainly and unmistakably within [the FLSA's] terms and spirit," *Solis*, 656 F.3d at 1083 (internal quotation marks omitted).

It is plausible to read the term "salesman" broadly and to connect the term to "servicing automobiles"; that is, one could consider a service advisor to be a "salesman . . . primarily engaged in . . . servicing automobiles." But, as explained in more detail below, in Part C, it is at least as plausible to read the nouns in a more cabined way: a salesman is an employee who sells cars; a partsman is an employee who requisitions, stocks, and dispenses parts; and a mechanic is an employee who performs mechanical work on cars. Service advisors do none of those things; they sell services for cars. They do not sell cars; they do not stock parts; and they do not perform mechanical work on cars.

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879 n.7 (2014); *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2172 n.21 (2012).

It is not clear from the text of the statute whether Congress intended broadly to exempt any salesman who is involved in the servicing of cars or, more narrowly, only those salesmen who are selling the cars themselves. Certainly Congress did not exempt all employees of a car dealership; for example, a bookkeeper who tracks invoices for car sales and servicing is plainly not exempt, nor is a secretarial employee who routes calls to the salesmen, partsmen, and mechanics. Nor do canons of statutory interpretation aid Defendant. To the contrary, the § 213 "exemptions are narrowly construed against employers." *Haro*, 745 F.3d at 1256.

In sum, the statutory text and canons of statutory interpretation yield no clear answer to whether Congress intended to include service advisors within the exemption. Because Congress has not "directly spoken to the precise question at issue," *Chevron*, 467 U.S. at 842, the statute is ambiguous.

B. *Chevron* Provides the Appropriate Lens.

When a statute is ambiguous, then we must determine, "prior to step two," the appropriate standard: either the *Chevron* test of reasonableness or a lower standard under *United States v. Mead Corp.*, 533 U.S. 218 (2001). *McMaster*, 731 F.3d at 889. Because we consider here a regulation duly promulgated after a notice-and-comment period, *Chevron's* "reasonableness" standard applies. *See, e.g.*, *Renee v. Duncan*, 623 F.3d 787, 795 (9th Cir. 2010) ("The challenged federal regulation interprets a federal statute. The regulation was adopted by the responsible federal agency through notice and comment rulemaking. We therefore apply the analytical framework outlined in *Chevron.*").

Nothing in the history of the regulation undermines that conclusion. Indeed, the original version of the regulation, promulgated in 1970, contained the same narrow definitions of "salesman," "partsman," and "mechanic." *See* 29 C.F.R. § 779.372(c)(1)-(3) (1970); *see also* Dep't of. Lab., Wage & Hour Div., Opinion Letter No. 660, 66-69 Lab. Cas. (CCH)¶ 30,652 (Aug. 4, 1967) (also providing the same narrow definitions). Those regulatory definitions have not changed in any relevant way since 1970. Because the agency's formal, regulatory position has not changed, the cases cited by Defendant are not on point. In *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2165 (2012), the Supreme Court addressed what level of deference to give to an agency's interpretation of its own regulations. Importantly, the parties agreed that "the regulations themselves . . . [were] entitled to deference under *Chevron.*" *Id.* Similarly, *U.S. Steel*, 678 F.3d at 598-99, involved only opinion letters; the agency had not issued formal regulations.

It is true that the Department of Labor occasionally has adopted the broader definitions, urged by Defendant here, in documents other than regulations. For example, the agency issued an opinion letter in 1978 that defined a "salesman" to encompass service advisors. Dep't of Lab. Opinion Letter No. WH-467, 1978 WL 51403 (July 28, 1978). Similarly, the agency amended its Field Operations Handbook in 1987 along the same lines. Field

Operations Handbook, Dep't of Lab., Wage & Hour Div., 24L04-4, Insert No. 1757 (Oct. 20, 1987).

The agency even proposed amending the formal regulation to adopt the broader definitions. 73 Fed. Reg. 43,654-01, 43,658-59, 43,671 (July 28, 2008). But it ultimately decided *against* making that change after receiving comments from the public and considering the relevant court decisions. 76 Fed. Red. at 18,838. The agency "acknowledge[d] that there are strongly held views on several of the issues presented in this rulemaking, and it has carefully considered all of the comments, analyses, and arguments made for and against the proposed changes in developing this final rule." *Id.* at 18,832. The regulatory history shows that the Department of Labor has given this particular issue considerable thought and has concluded that the better reading of the statute is to "limit[] the exemption to salesmen who sell vehicles and partsmen and mechanics who service vehicles." *Id.* at 18,838.

Moreover, even if we were to consider the agency's 2011 final rule a change of position, we still would conclude that *Chevron* supplies the appropriate standard of deference. As the Supreme Court explained in *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502 (2009), an agency is permitted to change its position. Consistent with *Fox*, the agency here expressly acknowledged that its position was contrary to its earlier opinion letter, and the agency rationally explained why, in its view, the court decisions to the contrary were erroneous. Under *Fox*, 556 U.S. at 515-18, nothing more is required. *Cf. Perez v. Mortg. Bankers Ass'n*, No. 13-1041, 2015 WL 998535 (U.S. Mar. 9, 2015) (holding that an agency may change its position in an interpretive rule without notice and comment).

The Department of Labor's regulations consistently—for 45 years—have interpreted the statutory exemption to apply narrowly. The agency reaffirmed that interpretation most recently in 2011, after thorough consideration of opposing views and after a formal notice-and-comment process. Under these circumstances, *Chevron* provides the appropriate legal standard.

C. At *Chevron* Step Two, the Regulation is Reasonable.

"Under *Chevron* step two, if the agency's interpretation is a reasonable one, this court may not substitute its own construction of the statutory provision." *CHW W. Bay v. Thompson*, 246 F.3d 1218, 1223 (9th Cir. 2001) (brackets and internal quotation marks omitted). Here, the Department of Labor has interpreted the statutory exemption to exclude service advisors by choosing the narrower definition of the term "salesman." For the reasons described below, we conclude that the agency has made a permissible choice. The interpretation accords with the presumption that the § 213 exemptions should be construed narrowly. *Haro*, 745 F.3d at 1256. Moreover, we are mindful of our role as a reviewing court: "The agency's interpretation need not be the best construction of the ambiguous statute." *Cervantes v. Holder*, 772 F.3d 583, 591 (9th Cir. 2014).

We recognize that our decision to uphold the agency's interpretation conflicts with decisions of the Fourth and Fifth Circuits, several district courts, and the Supreme Court of Montana. *Walton v. Greenbrier*

Ford, Inc., 370 F.3d 446 (4th Cir. 2004); *Brennan v. Deel Motors, Inc.*, 475 F.2d 1095 (5th Cir. 1973); *Brennan v. N. Bros. Ford, Inc.*, No. 40344, 1975 WL 1074 (E.D. Mich. Apr. 17, 1975) (unpublished), *aff'd sub. nom Dunlop v. N. Bros. Ford, Inc.*, 529 F.2d 524 (6th Cir. 1976) (table); *Brennan v. Import Volkswagen, Inc.*, No. W-4982, 1975 WL 1248 (D. Kan. Oct. 21, 1975) (unpublished); *Yenney v. Cass Cnty. Motors Co.*, No. 76-0-294, 1977 WL 1678 (D. Neb. Feb. 8, 1977) (unpublished); *Thompson v. J. C. Billion, Inc.,* 294 P.3d 397 (Mont. 2013). We respectfully disagree with those decisions.

In *Deel Motors* and the district court opinions following that case in the 1970s, courts held that service advisors are exempt because their duties and pay structure are "functionally similar" to those of the salesmen, partsmen, and mechanics whom the statute expressly exempts. 475 F.2d at 1097. But those cases pre-dated *Chevron* and the modern framework for deferring to an agency's interpretation. *See id.* (asking not whether the agency's interpretation was reasonable but, instead, determining for itself "the best interpretation," "the better reasoned interpretation," and "a common sense interpretation"); *see also id.* at 1098 (concluding that "[t]he intended scope of [the exemption] is not entirely clear" but not considering deference to the agency's position). In that regard, we agree with the Fourth Circuit that "[the] 'functionally similar' inquiry cannot be squared with FLSA's plain statutory and regulatory language." *Walton*, 370 F.3d at 451. Nothing in the statutory text suggests that Congress meant to exempt salesmen, partsmen, mechanics, and any other employees with functionally similar job duties and pay structure; the text exempts only certain salesmen, partsmen, and mechanics.

The closer question is whether the agency's interpretation is unreasonable because it is unduly restrictive, as the Fourth Circuit held in *Walton* and the Montana Supreme Court held in *Thompson*.[4] Those courts read § 213(b)(10)(A) as follows: "any salesman, partsman, or mechanic primarily engaged in [the general business of] selling or service automobiles." Service advisors are "salesmen" because their job is to sell services for cars. And service advisors are involved in the general business of "servicing automobiles," because their role is to help customers receive mechanical work on their cars. Accordingly, service advisors fall within the statutory definition. In effect, those courts held that that is the only reasonable reading of the statute.

The agency reads the statute differently: "any salesman, partsman, or mechanic primarily [and personally] engaged in selling or servicing automobiles." Service advisors may be "salesmen" in a generic sense, but they do not personally sell cars and they do not personally service cars. Accordingly, service advisors fall outside the statutory definition. In effect, the agency reads the statute as exempting salesmen who sell cars and partsmen and mechanics who service cars.

The Fourth Circuit rejected that interpretation as unreasonable because, with respect to "salesman," it purportedly reads out of the statute the second half of the disjunctive clause "'selling *or servicing automobiles*.'" *Walton*, 370 F.3d at 452 (emphasis by *Walton*) (quoting § 213(b)(10)(A)); *see also Thompson*, 294 P.3d at 402 ("A plain, grammatical reading of [the statute] makes clear that the term 'salesman' encompasses a broader category of employees than those only engaged in selling vehicles" because of "[t]he use of the disjunctive 'or' between the words 'selling *or* servicing'"). The Fourth Circuit's point is that, when Congress uses a list of disjunctive subjects (here, "salesman, partsman, or mechanic") followed by a list of disjunctive verbs (here, "selling or servicing"), the ordinary interpretation of that construction is that each subject is linked with each verb. For example, if someone says, "if my dogs or cats are eating or drinking, then I know not to pet them," we understand that phrase to be all-encompassing: the speaker refrains from petting a dog that is eating or drinking and a cat that is eating or drinking. It would contravene the speaker's intent to include, for example, only cats that were eating but to exclude dogs that were eating.

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[4] *Walton* considered the issue at *Chevron* step two, whereas *Thompson* considered the issue at *Chevron* step one. Otherwise, the reasoning of both courts is largely the same.

Critically, however, that analysis depends on context. Consider this slightly modified hypothetical: "if my dogs or cats are barking or meowing, then I know that they need to be let out." The Fourth Circuit's grammatical interpretation of that phrase would include a meowing dog and a barking cat. But most English speakers would interpret the sentence to refer only to a barking dog and a meowing cat. At a minimum, that implicit limitation would offer a reasonable interpretation of the speaker's intent.

Returning to the statute at hand, the agency's interpretation is reasonable. A natural reading of the text strongly suggests that Congress did not intend that both verb clauses would apply to all three subjects. For example, it is hard to imagine, in ordinary speech, a "mechanic primarily engaged in selling ... automobiles." That is, it seems that Congress intended the subject "mechanic" to be connected to only one of the two verb clauses, "servicing." The nature of the word "mechanic" strongly implies the actions that the person would take—servicing. *See American Heritage College Dictionary* 842 (3d ed. 2000) (defining "mechanic" as a "worker skilled in making, using, or repairing machines, vehicles, and tools"). The same can be said of the subject "salesman." It is hard to imagine, in ordinary speech, "salesman . . . primarily engaged in . . . servicing automobiles." Congress likely intended the subject "salesman" to be connected to only one of the two verb clauses, "selling." The nature of the word "salesman" strongly implies the actions that the person would take—selling. *See id.* at 1203 (defining "salesman" as a "man who sells merchandise").

It is important to note that the agency's reading does not render any term meaningless or superfluous. All three subjects (salesman, partsman, and mechanic) and both verbs (selling and servicing) retain meaning; it is just that some of the verbs do not apply to some of the subjects. If the agency read out a word altogether, its interpretation likely would be unreasonable. *See, e.g., Chubb Custom Ins. Co. v. Space Sys./Loral, Inc.*, 710 F.3d 946, 966 (9th Cir.

2013) ("It is a well-established rule of statutory construction that courts should not interpret statutes in a way that renders a provision superfluous."), *cert. denied*, 134 S. Ct. 906 (2014). But the regulation does not run afoul of that doctrine.

Non-textual indicators of congressional intent, such as legislative history, are inconclusive. *See Fournier v, Sebelius*, 718 F.3d 1110, 1123 (9th Cir. 2013) (holding that, at *Chevron* step two, "legislative history permissibly may be considered"), *cert. denied*, 134 S. Ct. 1501 (2014). We have found no mention, in the relevant reports or hearings, of service advisors, by name or by role. All references to "salesman" appear to refer to an employee who sells cars only. *See, e.g.*, 112 Cong. Rec. S20,504 (Aug. 24, 1966) (statement of Sen. Yarborough) ("It would not affect the salesman. He can go out and sell an Oldsmobile, a Pontiac, or a Buick all day long and all night."); *id.* ("The salesman tries to get people mainly after their hours of work. In some cases a man will leave his job, get his wife, and go to look at automobiles. So the hours of a salesman are different.").

In 1961, Congress exempted "any employee" of a car dealership. 29 U.S.C. § 213(a)(19) (1961); Pub. L. No. 87-30, § 9, 7S Stat. 65 (1961). A few years later, the Eighty-Ninth Congress considered three bills on this topic. The first bill, introduced in 1965, would have repealed altogether the exemption for employees of dealerships. H.R. 8259, 89th Cong. § 305 (introduced in House on May 18, 1965). The next bill, also introduced in 1965, would have exempted from overtime requirements "any salesman or mechanic employed by" a car dealership. H.R. 10,518, 89th

Cong. § 209 (introduced in House on Aug. 17, 1965); H.R. 10,518, 89th Cong. § 209 (reported in House on Aug. 25, 1965). Neither of those bills passed.

The final bill—H.R. 13,712—was enacted into law on September 23, 1966.[5] The first three versions, introduced in the first half of 1966, exempted either "any salesman or mechanic" or "any salesman, mechanic, or partsman" employed by a car dealership. H.R. 13,712, 89th Cong. § 209 (introduced in House on Mar. 16, 1965); *id.* (reported in House on Mar. 29, 1966); *id.* (referred in Senate on May 27, 1966). The final three versions all qualified the list of employees with the phrase, "primarily engaged in selling or servicing automobiles." *Id.* (reported in Senate on Aug. 23, 1966); *id.* (ordered to be printed in Senate on Aug. 25, 1966); Pub. L. No. 89-601 (Sept. 23, 1966). We know, then, that sometime in 1966 between May 27 and August 23, the Senate added that phrase. Unfortunately, the legislative history is silent on its meaning. *See, e.g.*, 112 Cong. Rec. H21,940 (Sept. 7, 1966) (House Conference Report: "The conference substitute conforms to the House provision regarding partsmen, except that such exemption shall be available only to salesmen, partsmen, and mechanics primarily engaged in selling or servicing such vehicles."); 112 Cong. Rec. S22,651 (Sept. 14, 1966) ("The resulting language follows the House exemption— including the Senate floor amendment— but with a somewhat narrower scope."); Sen. Comm. on Lab. & Pub. Welf., Report: No. 1487, p. 14, 89th Cong. (Aug. 23, 1966) ("Committee Report") ("Section 13(b) is amended to provide an overtime exemption for salesmen and mechanics who are primarily engaged in selling or servicing automobiles . . . .").

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[5] Defendant cites recent actions by the House of Representatives' Committee on Appropriations in an apparent attempt to prevent enforcement by the agency of the 2011 rule. That appropriations rider is not relevant. What one house of Congress thinks, in the 2010s, about enforcement priorities for the agency is entirely uninformative about the intent of Congress when it enacted a statute in 1966. Moreover, enforcement priorities do not change the content of the statute. If the Appropriations Committee were to instruct, for instance, that it did not want money spent on enforcing the statutes forbidding cultivation of fewer than five marijuana plants on federal lands, such cultivation would not become lawful.

The only possible exception, noted by *Deel Motors*, 475 F.2d at 1097 n.2, is found in the Committee Report on August 23, 1966:

> It is the intent of this exemption to exclude from the coverage of section 7 all mechanics and salesmen (other than partsmen) employed by an automobile, trailer, truck, farm implement or aircraft dealership even if they work in physically separate buildings or areas, or even if, though working in the principal building of the dealership, their work relates to the work of physically separate buildings or areas, so long as they are employed in a department which is functionally operated as part of the dealership.

Committee Report at 32. The Fifth Circuit quoted selectively from that passage for the proposition that the committee intended to exempt all mechanics and salesmen. *Deel Motors*, 475 F.2d at 1097 n.2. But the quoted passage also is found in earlier committee reports, which were written *before* the limiting phrase was added. *E.g.*, Sen. Comm. on Educ. & Lab., Report No. 871, p. 38, 89th Cong. (Aug. 25, 1965). Because the passage appeared both before and after the addition of the "primarily" proviso, the best reading of that passage is that the committee was addressing what provisions apply to employees who work in separate buildings, not what types of salesmen are exempt.

In sum, there are good arguments supporting both interpretations of the exemption. But where there are two reasonable ways to read the statutory text, and the agency has chosen one interpretation, we must defer to that choice. *Chevron*, 467 U.S. at 844. Accordingly, we hold that Plaintiffs are not exempt under 29 U.S.C. § 213(b)(10)(A).

Dismissal of claims 3, 5, and 7 AFFIRMED; dismissal of claim 1 and the supplemental state-law claims REVERSED; case REMANDED. Costs on appeal awarded to Plaintiffs.

Appendix D

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 13-55323

HECTOR NAVARRO; ANTHONY PINKINS; KEVIN MALONE;
AND REUBEN CASTRO,,

Plaintiffs-Appellants,

v.

ENCINO MOTORCARS, LLC, ERRONEOUSLY SUED AS
MERCEDES BENZ OF ENCINO,

Defendant-Appellee.

Filed: June 1, 2015

Before: GRABER and WARDLAW, Circuit Judges, and MAHAN,* District Judge.

ORDER

Judges Graber and Wardlaw have voted to deny Appellee's petition for rehearing en banc, and Judge Mahan has so recommended.

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* The Honorable James C. Mahan, United States District Judge for the District of Nevada, sitting by designation.

The full court has been advised of the petition for rehearing en banc, and no judge of the court has requested a vote on it.

Appellee's petition for rehearing en banc is DENIED.

Appendix E

UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

No. 2:12-cv-08051-RGK-MRW

NAVARRO, ET AL.,
Plaintiffs
v.
MERCEDES BENZ OF ENCINO,
Defendant.

Filed: January 25, 2013

(IN CHAMBERS) ORDER RE: DEFENDANT'S MOTION TO DISMISS

R. Gary Klausner, United States District Judge.

I. Introduction

On September 18, 2012, Hector Navarro, Mike Shirinian, Anthony Pinkins, Kevin Malone, and Reuben Castro (collectively "Plaintiffs") filed this complaint alleging nine claims against Mercedes Benz of Encino ("Defendant") for various violations of the Fair Labor Standards Act ("FLSA") and the California Labor Code.

On November 16, 2012, Defendant filed this Motion to Dismiss. The Court reviews Defendant's Motion to Dismiss as to four of the nine claims: (1)

First Claim: violation of FLSA 29 U.S.C. § 207 for failure to pay overtime wages,[1] (2) Third Claim: violation of FLSA 29 U.S.C. § 206 for failure to pay minimum wage, (3) Fifth Claim: violation of FLSA 29 U.S.C. § 207 for failure to provide extra compensation for work completed during mandatory meal and rest periods, and (4) Seventh Claim: violation of FLSA 29 U.S.C. § 211 for failure to provide a written, itemized statement detailing hours worked and compensation received.

For the reasons stated below, the Court GRANTS Defendant's Motion to Dismiss. Additionally, the remaining claims are state claims over which the Court will not exercise supplemental jurisdiction. Therefore, the Court dismisses those claims for lack of subject matter jurisdiction.

II. Factual Background

With the exception of Plaintiff Reuben Castro, Plaintiffs are all current employees of Defendant. Plaintiff Reuben Castro is a former employee. Defendant owns and operates a Mercedes Benz automobile dealership in Encino, California. This business sells and services both new and used Mercedes Benz automobiles. Plaintiffs work (or have worked) at the dealership as Service Advisors.

As Service Advisors, the Plaintiffs must: (1) meet and greet Mercedes Benz owners as they enter the service area and evaluate their service and repair needs; (2) solicit service to be conducted on the vehicle;

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[1] The Court notes that Plaintiffs' Complaint alleges a violation of 29 U.S.C. § 201; however, the proper statutory basis for the allegations asserted in the first claim is 29 U.S.C. § 207.

(3) solicit supplemental service to be performed on the vehicle; and (4) inform the vehicle owner about the status of the vehicle while Defendant's mechanics repair and service the vehicle. For every additional service or repair provided, the commission increases. Defendant pays Service Advisors, such as Plaintiffs, solely on this commission.

On September 18, 2012, Plaintiffs filed a complaint against Defendant alleging violations of both federal and state laws for failure to pay overtime, failure to pay minimum wage, failure to provide extra compensation for Plaintiffs' work during mandatory meal and rest periods, and failure to provide itemized wage statements to Plaintiffs. Additionally, Plaintiffs allege that because of these practices, Defendant has engaged in unfair competition in violation of California Business & Professions Code § 17200.

III. Judicial Standard

To comply with Federal Rules of Civil Procedure 8, a complaint must allege "enough facts to state a claim for relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). Under Rule 12(b)(6), a party may move to dismiss a claim for failure to allege enough facts to comply with Rule 8.

In deciding a Rule 12(b)(6) motion, a court must assume allegations in the challenged complaint are true, and must construe the complaint in the light most favorable to the nonmoving party. *Cahill v. Liberty Mut. Ins. Co.*, 80 F.3d 336, 337-38 (9th Cir. 1996). However, a court need not accept as true unreasonable inferences, unwarranted deductions of fact, or conclusory legal allegations cast in the form of factual allegations. *See W. Mining Council v. Watt*, 643

F.2d 618, 624 (9th Cir. 1981). The complaint need not contain detailed factual allegations, but must provide more than a "formulaic recitation of the elements of a claim." *Twombly*, 550 U.S. at 555.

IV. Discussion

Defendant argues Plaintiffs' claims should be dismissed for the following reasons: (1) Plaintiffs' First, Third, and Fifth Claims fail because Plaintiffs are exempt from the FLSA's maximum hour and minimum wage requirements; (2) alternatively, Plaintiffs' Third Claim fails because the Complaint pleads insufficient facts; (3) alternatively, Plaintiffs' Fifth Claim fails because § 207 does not require meal and rest periods; and (4) Plaintiffs' Seventh Claim fails because a violation of § 211 does not create a private right of action. The Court agrees.

A. First, Third, Fifth Claims Fail Based on Exemptions

Section 206 states, in pertinent part, that every employer shall pay to each of his employees not less than $7.25 an hour. 29 U.S.C. § 206(a)(1)(C). Section 207 states no employer shall employ any employee for a workweek longer than forty hours unless the employee receives additional compensation specified at a rate not less than one-half the regular rate at which the employer generally pays the employee. 29 U.S.C. § 207(a).

Section 213 creates an exemption to the above provision for "any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles . . . if he is employed by a nonmanufacturing establishment primarily engaged in the business of selling such vehicles or implements to ultimate purchasers." Courts have applied this exemption to Service Advisors. See *Brennan v. Deel Motors*, 475 F.2d 1095, 1097 (5th Cir. 1973) (" . . . a common sense interpretation and application of this exemption mandates inclusion of service salesmen within its scope."); *Walton v. Greenbrier Ford*, 370 F.3d 446, 453 (4th Cir. 2004).

The Department of Labor ("DOL"), however, has expressly rejected this interpretation. The DOL defines a salesman as an employee "primarily engaged in making sales or obtaining orders or contracts for sale of automobiles." 29 C.F.R. § 779.372(c)(1). A mechanic is an employee "primarily engaged in doing mechanical work in the servicing of an automobile." 29 C.F.R. § 779.372(c)(3). In a "final rule," the Wage and Hour Division of the DOL explained that "[t]he Department notes that current § 779.372(c)(1) . . . limit[s] the exemption to salesmen who sell vehicles and partsmen and mechanics who service vehicles." Updating Regulations Issued Under the Fair Labor Standards Act, 76 Fed. Reg. 18832-01 (April 5, 2011). Thus, under the DOL's enforcement of § 213(b)(10)(A), Service Advisors are not exempt from the hour/wage requirements set forth in §§ 206 and 207.

Given the conflicting interpretations, the Court must first look to the statutory language. Where the statutory language is clear, the Court is bound by such language as a clear expression of legislative intent. *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 842-43 (1984). Where the statutory language is ambiguous, however, the Court accords deference to the DOL action based on the nature of that action. "Legislative regulations" are given a high level of judicial deference, and will stand unless arbitrary or capricious. *Id.* at 844. Mere "interpretations," however, are accorded lower deference, and will stand only so long as they are reasonable. *Id.*

1. The Statutory Language is Ambiguous as Applied to Service Advisors

Here, the statutory language of § 213(b)(10)(A) does not expressly exempt Service Advisors. However, the job description of a Service Advisor encompasses those of both a salesman and a mechanic, and falls squarely within the category of positions exempted by the provision. The legislative history demonstrates an intent to "narrow significantly the reach of the automobile dealership employee exemption." *Gieg v. Howarth*, 244 F.3d 775, 776 (9th Cir. 2001). Nonetheless, it is not clear that Congress intended Service Advisors to be excluded, particularly when their job duties are simply a hybrid of two jobs expressly listed within the exemption. For this reason, the Court finds § 213(b)(10)(A) ambiguous as applied to Service Advisors. See *Brennan v. Deel Motors, Inc.*, 475 F.2d 1095, 1098 (5th Cir. 1973) ("The intended scope of [the exemption] is not entirely clear. Indeed, the Secretary's own interpretation of the coverage of that section is not altogether consistent.").

2. The DOL's Interpretation is not Reasonable

In light of the finding above, the Court's role is to "determine whether the agency's interpretation is based on a permissible construction of the statute." *Chevron*, 467 U.S. at 843. As previously stated, the permissiveness of the agency's construction depends upon the nature of the agency action, as allowed by Congress. When Congress has "explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency." *Id.* at 844. In such a case, agency decisions are "legislative regulations" that are given "controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute." *Id.* When Congress has not left such an explicit gap, agency actions are mere interpretations that are upheld only if reasonable. *Id.*

Within the § 213 arena, the U.S. Supreme Court has found agency action to constitute "legislative regulation." See *Auer v. Robbins*, 519 U.S. 452 (1997); *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158 (2007). However, in those cases, the specific provisions being reviewed expressly grant the Secretary of Labor the power to "defin[e] and delimi[t]" the terms in the section. *Id.* As such, the Court found that the statute creates an explicit gap for the agency to fill. *Id.* at 172. This case is distinguishable. Here, the applicable section, § 213(10)(b)(A), does not contain any such language. It is clear that where Congress intended to grant the agency power to create legislative regulation, it included language to that effect. In the absence of similar language, this Court will not read into the statute the grant of such power. Therefore, the Court finds that the agency action is not a legislative regulation, but rather, a mere interpretation, which is accorded lower deference.

Having established that the DOL's action is an interpretation, the Court is bound to the DOL interpretation only if the interpretation is reasonable. *Chevron*, 467 U.S. at 844. The Court agrees with both the Fourth and Fifth Circuits, and holds that the DOL interpretation of § 213(b)(10)(A) is unreasonable. When faced with facts nearly identical to those of the present case, the Fourth Circuit concluded that the "Secretary's interpretation of . . . [salesman] is unreasonable, as it is an impermissibly restrictive construction of the statute." *Walton*, 370 F.3d at 452. Similarly, the Fifth Circuit explained that "[i]n the absence of clear intent to the contrary, we cannot assume that Congress intended to treat employees with functionally similar positions differently." *Brennan*, 475 F.2d at 1097-98. Service Advisors, such as Plaintiffs, are functionally equivalent to salesmen and mechanics and are similarly responsible for the "selling and servicing" of automobiles. Accordingly, the Court finds the DOL's interpretation unreasonable. As such, the Court finds that Service Advisors fall within the exemption of § 213(b)(10)(A).

The Court dismisses Plaintiffs' first, third, and fifth claims, which all allege violations of §§ 206 and 207.

B. Third Claim Fails to Allege Sufficient Facts

As discussed above, the minimum wage requirements established in § 206 do not apply to Plaintiffs because Service Advisors are exempt under § 213(b)(10)(A). Even if they did apply, however, Plaintiff's Third Claim fails to plead sufficient facts to survive a Rule 12(b)(6) Motion.

Legal conclusions alone, without some factual allegations, do not provide fair notice of the nature of the claim nor the grounds on which the claim rests. *Bell Atlantic Corp. v. Twombly*, 550 U.S. at 556. Here, Plaintiffs allege only that Defendant (1) failed to provide an hourly wage, (2) paid Plaintiffs on a pure commission basis, (3) required Plaintiffs to work for wages less than the legal minimum, and (4) refused to pay minimum wages. A salary based solely on commission can still satisfy the minimum wage requirement. See 29 C.F.R. § 778.117. No facts demonstrate that the commissions Plaintiffs earned do not satisfy the minimum wage requirements. Even if a Motion to Dismiss is not designed to correct inartistic pleading, as Plaintiff argues, these legal conclusions alone are insufficient to survive a Rule 12(b)(6) Motion.

C. Fifth Claim Fails to State a Claim

To the extent Plaintiffs' Fifth Claim alleges that Defendant failed to provide Plaintiffs with overtime compensation in violation of § 207, this Section does not apply to Service Advisors. As discussed above, Plaintiffs are exempt under § 213(b)(10)(A).

To the extent Plaintiffs' Fifth Claim alleges that Defendant failed to provide Plaintiffs with meal or rest periods, neither § 207 nor the cited DOL regulations mandate rest and meal periods. Section 785.18 simply states that: "Rest periods of short duration, running from 5 minutes to about 20 minutes . . . must be counted as hours worked." 29 C.F.R.§ 785.18. Section 785.19 states that "[b]ona fide meal periods are not worktime . . . The employee must be completely relieved from duty for the purposes of eating regular meals . . . The employee is not relieved if he is required to perform any duties, whether active or inactive, while eating." 29 C.F.R. § 785.19. These statutes simply determine when employees must be compensated for working during these periods, but do not require an employer to provide their employees with meal or rest periods. On this ground, the Court dismisses Plaintiff's Fifth Claim.

D. Seventh Claim Fails Because § 211 Does Not Create a Private Right of Action

Section 29 U.S.C. § 211 states: "Every employer subject to any provision of this chapter . . . shall make, keep, and preserve such records of the persons employed by him and of the wages, hours, and other conditions and practices of employment maintained by him, and shall preserve such records . . . " Section 217 authorizes only the Secretary to initiate injunction proceedings involving an employer's failure to comply with the record keeping requirements. 29 U.S.C. § 217. Put simply, § 211(c) does not create a private action against an employer for failure to comply with the record-keeping provisions. *Elwell v. University Hospitals Home Care Services*, 276 F.3d 832, 843 (6th Cir. 2002). Therefore, the Court dismisses Plaintiff's Seventh Claim.

E. The Remaining State Law Causes of Action

Having dismissed all federal claims alleged, the Court exercises its discretion under 28 U.S.C. § 1367(c) to dismiss the remaining state law causes of action for lack of subject matter jurisdiction.

V. Conclusion

The Court GRANTS Defendant's Motion to Dismiss as to Plaintiffs' First, Third, Fifth, and Seventh claims. The Court *sua sponte* DISMISSES the remaining state law causes of action. As such, Plaintiffs' Complaint is dismissed in its entirety.

IT IS SO ORDERED.

Appendix F

29 U.S.C. § 213
EXEMPTIONS

(a) Minimum wage and maximum hour requirements

The provisions of sections 206 (except subsection (d) in the case of paragraph (1) of this subsection) and 207 of this title shall not apply with respect to—

(1) any employee employed in a bona fide executive, administrative, or professional capacity (including any employee employed in the capacity of academic administrative personnel or teacher in elementary or secondary schools), or in the capacity of outside salesman (as such terms are defined and delimited from time to time by regulations of the Secretary, subject to the provisions of subchapter II of chapter 5 of title 5, except that an employee of a retail or service establishment shall not be excluded from the definition of employee employed in a bona fide executive or administrative capacity because of the number of hours in his workweek which he devotes to activities not directly or closely related to the performance of executive or administrative activities, if less than 40 per centum of his hours worked in the workweek are devoted to such activities); or

(2) Repealed. Pub. L. 101-157, § 3(c)(1), Nov. 17, 1989, 103 Stat. 939.

(3) any employee employed by an establishment which is an amusement or recreational establishment, organized camp, or

religious or non-profit educational conference center, if (A) it does not operate for more than seven months in any calendar year, or (B) during the preceding calendar year, its average receipts for any six months of such year were not more than 331/3 per centum of its average receipts for the other six months of such year, except that the exemption from sections 206 and 207 of this title provided by this paragraph does not apply with respect to any employee of a private entity engaged in providing services or facilities (other than, in the case of the exemption from section 206 of this title, a private entity engaged in providing services and facilities directly related to skiing) in a national park or a national forest, or on land in the National Wildlife Refuge System, under a contract with the Secretary of the Interior or the Secretary of Agriculture; or

(4) Repealed. Pub. L. 101-157, § 3(c)(1), Nov. 17, 1989, 103 Stat. 939.

(5) any employee employed in the catching, taking, propagating, harvesting, cultivating, or farming of any kind of fish, shellfish, crustacea, sponges, seaweeds, or other aquatic forms of animal and vegetable life, or in the first processing, canning or packing such marine products at sea as an incident to, or in conjunction with, such fishing operations, including the going to and returning from work and loading and unloading when performed by any such employee; or

(6) any employee employed in agriculture (A) if such employee is employed by an employer who

did not, during any calendar quarter during the preceding calendar year, use more than five hundred man-days of agricultural labor, (B) if such employee is the parent, spouse, child, or other member of his employer's immediate family, (C) if such employee (i) is employed as a hand harvest laborer and is paid on a piece rate basis in an operation which has been, and is customarily and generally recognized as having been, paid on a piece rate basis in the region of employment, (ii) commutes daily from his permanent residence to the farm on which he is so employed, and (iii) has been employed in agriculture less than thirteen weeks during the preceding calendar year, (D) if such employee (other than an employee described in clause (C) of this subsection) (i) is sixteen years of age or under and is employed as a hand harvest laborer, is paid on a piece rate basis in an operation which has been, and is customarily and generally recognized as having been, paid on a piece rate basis in the region of employment, (ii) is employed on the same farm as his parent or person standing in the place of his parent, and (iii) is paid at the same piece rate as employees over age sixteen are paid on the same farm, or (E) if such employee is principally engaged in the range production of livestock; or

(7) any employee to the extent that such employee is exempted by regulations, order, or certificate of the Secretary issued under section 214 of this title; or

(8) any employee employed in connection with the publication of any weekly, semiweekly, or daily newspaper with a circulation of less than four thousand the major part of which circulation is within the county where published or counties contiguous thereto; or

(9) Repealed. Pub. L. 93-259, § 23(a)(1), Apr. 8, 1974, 88 Stat. 69.

(10) any switchboard operator employed by an independently owned public telephone company which has not more than seven hundred and fifty stations; or

(11) Repealed. Pub. L. 93-259, § 10(a), Apr. 8, 1974, 88 Stat. 63.

(12) any employee employed as a seaman on a vessel other than an American vessel; or

(13), (14) Repealed. Pub. L. 93-259, §§ 9(b)(1), 23(b)(1), Apr. 8, 1974, 88 Stat. 63, 69.

(15) any employee employed on a casual basis in domestic service employment to provide babysitting services or any employee employed in domestic service employment to provide companionship services for individuals who (because of age or infirmity) are unable to care for themselves (as such terms are defined and delimited by regulations of the Secretary); or

(16) a criminal investigator who is paid availability pay under section 5545a of title 5; or

(17) any employee who is a computer systems analyst, computer programmer, software engineer, or other similarly skilled worker, whose primary duty is—

(A) the application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software, or system functional specifications;

(B) the design, development, documentation, analysis, creation, testing, or modification of computer systems or programs, including prototypes, based on and related to user or system design specifications;

(C) the design, documentation, testing, creation, or modification of computer programs related to machine operating systems; or

(D) a combination of duties described in subparagraphs (A), (B), and (C) the performance of which requires the same level of skills, and

who, in the case of an employee who is compensated on an hourly basis, is compensated at a rate of not less than $27.63 an hour.

(b) Maximum hour requirements

The provisions of section 207 of this title shall not apply with respect to—

(1) any employee with respect to whom the Secretary of Transportation has power to establish qualifications and maximum hours of service pursuant to the provisions of section 31502 of title 49; or

(2) any employee of an employer engaged in the operation of a rail carrier subject to part A of subtitle IV of title 49; or

(3) any employee of a carrier by air subject to the provisions of title II of the Railway Labor Act [45 U.S.C. 181 et seq.]; or

(4) Repealed. Pub. L. 93-259, § 11(c), Apr. 8, 1974, 88 Stat. 64.

(5) any individual employed as an outside buyer of poultry, eggs, cream, or milk, in their raw or natural state; or

(6) any employee employed as a seaman; or

(7) Repealed. Pub. L. 93-259, § 21(b)(3), Apr. 8, 1974, 88 Stat. 68.

(8) Repealed. Pub. L. 95-151, § 14(b), Nov. 1, 1977, 91 Stat. 1252.

(9) any employee employed as an announcer, news editor, or chief engineer by a radio or television station the major studio of which is located (A) in a city or town of one hundred thousand population or less, according to the latest available decennial census figures as compiled by the Bureau of the Census, except where such city or town is part of a standard metropolitan statistical area, as defined and designated by the Office of Management and Budget, which has a total population in excess of one hundred thousand, or (B) in a city or town of twenty-five thousand population or less, which is part of such an area but is at least 40 airline miles from the principal city in such area; or

(10)(A) any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles, trucks, or farm implements, if he is employed by a nonmanufacturing establishment primarily engaged in the business of selling such vehicles or implements to ultimate purchasers; or

> (B) any salesman primarily engaged in selling trailers, boats, or aircraft, if he is employed by a nonmanufacturing establishment primarily engaged in the business of selling trailers, boats, or aircraft to ultimate purchasers; or

(11) any employee employed as a driver or driver's helper making local deliveries, who is compensated for such employment on the basis of trip rates, or other delivery payment plan, if the Secretary shall find that such plan has the general purpose and effect of reducing hours worked by such employees to, or below, the maximum workweek applicable to them under section 207(a) of this title; or

(12) any employee employed in agriculture or in connection with the operation or maintenance of ditches, canals, reservoirs, or waterways, not owned or operated for profit, or operated on a sharecrop basis, and which are used exclusively for supply and storing of water, at least 90 percent of which was ultimately delivered for agricultural purposes during the preceding calendar year; or

(13) any employee with respect to his employment in agriculture by a farmer, notwithstanding other employment of such employee in connection with livestock auction

operations in which such farmer is engaged as an adjunct to the raising of livestock, either on his own account or in conjunction with other farmers, if such employee (A) is primarily employed during his workweek in agriculture by such farmer, and (B) is paid for his employment in connection with such livestock auction operations at a wage rate not less than that prescribed by section 206(a)(1) of this title; or

(14) any employee employed within the area of production (as defined by the Secretary) by an establishment commonly recognized as a country elevator, including such an establishment which sells products and services used in the operation of a farm, if no more than five employees are employed in the establishment in such operations; or

(15) any employee engaged in the processing of maple sap into sugar (other than refined sugar) or syrup; or

(16) any employee engaged (A) in the transportation and preparation for transportation of fruits or vegetables, whether or not performed by the farmer, from the farm to a place of first processing or first marketing within the same State, or (B) in transportation, whether or not performed by the farmer, between the farm and any point within the same State of persons employed or to be employed in the harvesting of fruits or vegetables; or

(17) any driver employed by an employer engaged in the business of operating taxicabs; or

(18), (19) Repealed. Pub. L. 93-259, §§ 15(c), 16(b), Apr. 8, 1974, 88 Stat. 65.

(20) any employee of a public agency who in any workweek is employed in fire protection activities or any employee of a public agency who in any workweek is employed in law enforcement activities (including security personnel in correctional institutions), if the public agency employs during the workweek less than 5 employees in fire protection or law enforcement activities, as the case may be; or

(21) any employee who is employed in domestic service in a household and who resides in such household; or

(22) Repealed. Pub. L. 95-151, § 5, Nov. 1, 1977, 91 Stat. 1249.

(23) Repealed. Pub. L. 93-259, § 10(b)(3), Apr. 8, 1974, 88 Stat. 64.

(24) any employee who is employed with his spouse by a nonprofit educational institution to serve as the parents of children—

(A) who are orphans or one of whose natural parents is deceased, or

(B) who are enrolled in such institution and reside in residential facilities of the institution,

while such children are in residence at such institution, if such employee and his spouse reside in such facilities, receive, without cost, board and lodging from such institution, and are together compensated, on a cash basis, at an annual rate of not less than $10,000; or

(25), (26) Repealed. Pub. L. 95-151, §§ 6(a), 7(a), Nov. 1, 1977, 91 Stat. 1249, 1250.

(27) any employee employed by an establishment which is a motion picture theater; or

(28) any employee employed in planting or tending trees, cruising, surveying, or felling timber, or in preparing or transporting logs or other forestry products to the mill, processing plant, railroad, or other transportation terminal, if the number of employees employed by his employer in such forestry or lumbering operations does not exceed eight;

(29) any employee of an amusement or recreational establishment located in a national park or national forest or on land in the National Wildlife Refuge System if such employee (A) is an employee of a private entity engaged in providing services or facilities in a national park or national forest, or on land in the National Wildlife Refuge System, under a contract with the Secretary of the Interior or the Secretary of Agriculture, and (B) receives compensation for employment in excess of fifty-six hours in any workweek at a rate not less than one and one-half times the regular rate at which he is employed; or

(30) a criminal investigator who is paid availability pay under section 5545a of title 5.

(c) Child labor requirements

(1) Except as provided in paragraph (2) or (4), the provisions of section 212 of this title relating to child labor shall not apply to any employee

employed in agriculture outside of school hours for the school district where such employee is living while he is so employed, if such employee—

(A) is less than twelve years of age and (i) is employed by his parent, or by a person standing in the place of his parent, on a farm owned or operated by such parent or person, or (ii) is employed, with the consent of his parent or person standing in the place of his parent, on a farm, none of the employees of which are (because of subsection (a)(6)(A) of this section) required to be paid at the wage rate prescribed by section 206(a)(5) of this title,

(B) is twelve years or thirteen years of age and (i) such employment is with the consent of his parent or person standing in the place of his parent, or (ii) his parent or such person is employed on the same farm as such employee, or

(C) is fourteen years of age or older.

(2) The provisions of section 212 of this title relating to child labor shall apply to an employee below the age of sixteen employed in agriculture in an occupation that the Secretary of Labor finds and declares to be particularly hazardous for the employment of children below the age of sixteen, except where such employee is employed by his parent or by a person standing in the place of his parent on a farm owned or operated by such parent or person.

(3) The provisions of section 212 of this title relating to child labor shall not apply to any child

employed as an actor or performer in motion pictures or theatrical productions, or in radio or television productions.

(4)(A) An employer or group of employers may apply to the Secretary for a waiver of the application of section 212 of this title to the employment for not more than eight weeks in any calendar year of individuals who are less than twelve years of age, but not less than ten years of age, as hand harvest laborers in an agricultural operation which has been, and is customarily and generally recognized as being, paid on a piece rate basis in the region in which such individuals would be employed. The Secretary may not grant such a waiver unless he finds, based on objective data submitted by the applicant, that—

> (i) the crop to be harvested is one with a particularly short harvesting season and the application of section 212 of this title would cause severe economic disruption in the industry of the employer or group of employers applying for the waiver;
>
> (ii) the employment of the individuals to whom the waiver would apply would not be deleterious to their health or well-being;
>
> (iii) the level and type of pesticides and other chemicals used would not have an adverse effect on the health or well-being of the individuals to whom the waiver would apply;

(iv) individuals age twelve and above are not available for such employment; and

(v) the industry of such employer or group of employers has traditionally and substantially employed individuals under twelve years of age without displacing substantial job opportunities for individuals over sixteen years of age.

(B) Any waiver granted by the Secretary under subparagraph (A) shall require that—

(i) the individuals employed under such waiver be employed outside of school hours for the school district where they are living while so employed;

(ii) such individuals while so employed commute daily from their permanent residence to the farm on which they are so employed; and

(iii) such individuals be employed under such waiver (I) for not more than eight weeks between June 1 and October 15 of any calendar year, and (II) in accordance with such other terms and conditions as the Secretary shall prescribe for such individuals' protection.

(5)(A) In the administration and enforcement of the child labor provisions of this chapter, employees who are 16 and 17 years of age shall be permitted to load materials into, but not operate or unload materials from, scrap paper balers and paper box compactors—

(i) that are safe for 16- and 17-year-old employees loading the scrap paper balers or paper box compactors; and

(ii) that cannot be operated while being loaded.

(B) For purposes of subparagraph (A), scrap paper balers and paper box compactors shall be considered safe for 16- or 17-year-old employees to load only if—

(i)(I) the scrap paper balers and paper box compactors meet the American National Standards Institute's Standard ANSI Z245.5-1990 for scrap paper balers and Standard ANSI Z245.2-1992 for paper box compactors; or

(II) the scrap paper balers and paper box compactors meet an applicable standard that is adopted by the American National Standards Institute after August 6, 1996, and that is certified by the Secretary to be at least as protective of the safety of minors as the standard described in subclause (I);

(ii) the scrap paper balers and paper box compactors include an on-off switch incorporating a key-lock or other system and the control of the system is maintained in the custody of employees who are 18 years of age or older;

(iii) the on-off switch of the scrap paper balers and paper box compactors is maintained in an off position when the scrap paper balers and paper box compactors are not in operation; and

(iv) the employer of 16- and 17-year-old employees provides notice, and posts a notice, on the scrap paper balers and paper box compactors stating that—

(I) the scrap paper balers and paper box compactors meet the applicable standard described in clause (i);

(II) 16- and 17-year-old employees may only load the scrap paper balers and paper box compactors; and

(III) any employee under the age of 18 may not operate or unload the scrap paper balers and paper box compactors.

The Secretary shall publish in the Federal Register a standard that is adopted by the American National Standards Institute for scrap paper balers or paper box compactors and certified by the Secretary to be protective of the safety of minors under clause (i)(II).

(C)(i) Employers shall prepare and submit to the Secretary reports—

(I) on any injury to an employee under the age of 18 that requires medical treatment (other than first aid) resulting from the employee's contact with a scrap paper baler or paper box compactor during the loading, operation, or unloading of the baler or compactor; and

(II) on any fatality of an employee under the age of 18 resulting from the employee's contact with a scrap paper baler or paper box compactor during the loading, operation, or unloading of the baler or compactor.

(ii) The reports described in clause (i) shall be used by the Secretary to determine whether or not the implementation of subparagraph (A) has had any effect on the safety of children.

(iii) The reports described in clause (i) shall provide—

(I) the name, telephone number, and address of the employer and the address of the place of employment where the incident occurred;

(II) the name, telephone number, and address of the employee who suffered an injury or death as a result of the incident;

(III) the date of the incident;

(IV) a description of the injury and a narrative describing how the incident occurred; and

(V) the name of the manufacturer and the model number of the scrap paper baler or paper box compactor involved in the incident.

(iv) The reports described in clause (i) shall be submitted to the Secretary promptly, but not later than 10 days after the date on which an incident relating to an injury or death occurred.

(v) The Secretary may not rely solely on the reports described in clause (i) as the basis for making a determination that any of the employers described in clause (i) has violated a provision of section 212 of this title relating to oppressive child labor or a regulation or order issued pursuant to section 212 of this title. The Secretary shall, prior to making such a determination, conduct an investigation and inspection in accordance with section 212(b) of this title.

(vi) The reporting requirements of this subparagraph shall expire 2 years after August 6, 1996.

(6) In the administration and enforcement of the child labor provisions of this chapter, employees who are under 17 years of age may not drive automobiles or trucks on public roadways. Employees who are 17 years of age may drive automobiles or trucks on public roadways only if—

(A) such driving is restricted to daylight hours;

(B) the employee holds a State license valid for the type of driving involved in the job performed and has no records of any moving violation at the time of hire;

(C) the employee has successfully completed a State approved driver education course;

(D) the automobile or truck is equipped with a seat belt for the driver and any passengers and the employee's employer has instructed the employee that the seat belts must be used when driving the automobile or truck;

(E) the automobile or truck does not exceed 6,000 pounds of gross vehicle weight;

(F) such driving does not involve—

(i) the towing of vehicles;

(ii) route deliveries or route sales;

(iii) the transportation for hire of property, goods, or passengers;

(iv) urgent, time-sensitive deliveries;

(v) more than two trips away from the primary place of employment in any single day for the purpose of delivering goods of the employee's employer to a customer (other than urgent, time-sensitive deliveries);

(vi) more than two trips away from the primary place of employment in any single day for the purpose of transporting passengers (other than employees of the employer);

(vii) transporting more than three passengers (including employees of the employer); or

(viii) driving beyond a 30 mile radius from the employee's place of employment; and

(G) such driving is only occasional and incidental to the employee's employment.

For purposes of subparagraph (G), the term "occasional and incidental" is no more than one-third of an employee's worktime in any workday and no more than 20 percent of an employee's worktime in any workweek.

(7)(A)(i) Subject to subparagraph (B), in the administration and enforcement of the child labor provisions of this chapter, it shall not be considered oppressive child labor for a new entrant into the workforce to be employed inside or outside places of business where machinery is used to process wood products.

(ii) In this paragraph, the term "new entrant into the workforce" means an individual who—

(I) is under the age of 18 and at least the age of 14, and

(II) by statute or judicial order is exempt from compulsory school attendance beyond the eighth grade.

(B) The employment of a new entrant into the workforce under subparagraph (A) shall be permitted—

(i) if the entrant is supervised by an adult relative of the entrant or is supervised by an adult member of the same religious sect or division as the entrant;

(ii) if the entrant does not operate or assist in the operation of power-driven woodworking machines;

(iii) if the entrant is protected from wood particles or other flying debris within the workplace by a barrier appropriate to the potential hazard of such wood particles or flying debris or by maintaining a sufficient distance from machinery in operation; and

(iv) if the entrant is required to use personal protective equipment to prevent exposure to excessive levels of noise and saw dust.

(d) Delivery of newspapers and wreathmaking

The provisions of sections 206, 207, and 212 of this title shall not apply with respect to any employee engaged in the delivery of newspapers to the consumer or to any homeworker engaged in the making of wreaths composed principally of natural holly, pine, cedar, or other evergreens (including the harvesting of the evergreens or other forest products used in making such wreaths).

(e) Maximum hour requirements and minimum wage employees

The provisions of section 207 of this title shall not apply with respect to employees for whom the Secretary of Labor is authorized to establish minimum wage rates as provided in section 206(a)(3) of this title, except with respect to employees for whom such rates are in effect; and with respect to such employees the Secretary may make rules and regulations providing reasonable limitations and allowing reasonable variations, tolerances, and exemptions to and from any or all of the provisions of section 207 of this title if he shall find, after a public hearing on the matter, and taking into account the factors set forth in section 206(a)(3) of this title, that economic conditions warrant such action.

(f) Employment in foreign countries and certain United States territories

The provisions of sections 206, 207, 211, and 212 of this title shall not apply with respect to any employee whose services during the workweek are performed in a workplace within a foreign country or within territory under the jurisdiction of the United States other than the following: a State of the United States; the District of Columbia; Puerto Rico; the Virgin Islands; outer Continental Shelf lands defined in the Outer Continental Shelf Lands Act (ch. 345, 67 Stat. 462) [43 U.S.C. 1331 et seq.]; American Samoa; Guam; Wake Island; Eniwetok Atoll; Kwajalein Atoll; and Johnston Island.

(g) Certain employment in retail or service establishments, agriculture

The exemption from section 206 of this title provided by paragraph (6) of subsection (a) of this section shall not apply with respect to any employee employed by an establishment (1) which controls, is controlled by, or is under common control with, another establishment the activities of which are not related for a common business purpose to, but materially support the activities of the establishment employing such employee; and (2) whose annual gross volume of sales made or business done, when combined with the annual gross volume of sales made or business done by each establishment which controls, is controlled by, or is under common control with, the establishment employing such employee, exceeds $10,000,000 (exclusive of excise taxes at the retail level which are separately stated).

(h) Maximum hour requirement: fourteen workweek limitation

The provisions of section 207 of this title shall not apply for a period or periods of not more than fourteen workweeks in the aggregate in any calendar year to any employee who—

(1) is employed by such employer—

(A) exclusively to provide services necessary and incidental to the ginning of cotton in an establishment primarily engaged in the ginning of cotton;

(B) exclusively to provide services necessary and incidental to the receiving, handling, and storing of raw cotton and the compressing of raw cotton when performed at a cotton warehouse or compress-warehouse facility, other than one operated in conjunction with a cotton mill, primarily engaged in storing and compressing;

(C) exclusively to provide services necessary and incidental to the receiving, handling, storing, and processing of cottonseed in an establishment primarily engaged in the receiving, handling, storing, and processing of cottonseed; or

(D) exclusively to provide services necessary and incidental to the processing of sugar cane or sugar beets in an establishment primarily engaged in the processing of sugar cane or sugar beets; and

(2) receives for—

(A) such employment by such employer which is in excess of ten hours in any workday, and

(B) such employment by such employer which is in excess of forty-eight hours in any workweek,

compensation at a rate not less than one and one-half times the regular rate at which he is employed.

Any employer who receives an exemption under this subsection shall not be eligible for any other exemption under this section or section 207 of this title.

(i) Cotton ginning

The provisions of section 207 of this title shall not apply for a period or periods of not more than fourteen workweeks in the aggregate in any period of fifty-two consecutive weeks to any employee who—

(1) is engaged in the ginning of cotton for market in any place of employment located in a county where cotton is grown in commercial quantities; and

(2) receives for any such employment during such workweeks—

(A) in excess of ten hours in any workday, and

(B) in excess of forty-eight hours in any workweek,

compensation at a rate not less than one and one-half times the regular rate at which he is employed. No week included in any fifty-two week period for purposes of the preceding sentence may be included for such purposes in any other fifty-two week period.

(j) Processing of sugar beets, sugar beet molasses, or sugar cane

The provisions of section 207 of this title shall not apply for a period or periods of not more than fourteen workweeks in the aggregate in any period of fifty-two consecutive weeks to any employee who—

(1) is engaged in the processing of sugar beets, sugar beet molasses, or sugar cane into sugar (other than refined sugar) or syrup; and

(2) receives for any such employment during such workweeks—

(A) in excess of ten hours in any workday, and

(B) in excess of forty-eight hours in any workweek,

compensation at a rate not less than one and one-half times the regular rate at which he is employed. No week included in any fifty-two week period for purposes of the preceding sentence may be included for such purposes in any other fifty-two week period.

RECORD
AND
BRIEFS

Supreme Court, U.S.
FILED
JUL 21 2017
OFFICE OF THE CLER

No. 16–1362

In The Supreme Court of the United States

ENCINO MOTORCARS, LLC,
PETITIONER

v.

HECTOR NAVARRO, MIKE SHIRINIAN, ANTHONY PINKINS, KEVIN MALONE, AND REUBEN CASTRO,
RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Service advisors at automobile dealerships meet and greet customers, write up their requests for automobile services, suggest additional work, and forward these work orders to other dealership employees. The Fair Labor Standards Act (FLSA) generally guarantees dealership employees time-and-a-half compensation for overtime, but exempts three enumerated types of dealership employees: "salesm[e]n, partsm[e]n, or mechanic[s] primarily engaged in selling or servicing automobiles." 29 U.S.C. § 213(b)(10)(A). The exemption does not mention service advisors or selling services.

The question presented is:

Does the FLSA's overtime exemption for automobile dealership salesmen, partsmen, and mechanics also exempt service advisors from overtime protections?

PARTIES TO THE PROCEEDING

Respondents Hector Navarro, Mike Shirinian, Anthony Pinkins, Kevin Malone, and Reuben Castro were plaintiffs in the district court and appellants in the court of appeals. Respondent Mike Shirinian was erroneously omitted from the caption of the court of appeals' first opinion. Thereafter, the court of appeals granted appellants' motion to correct the caption and included his name in the caption of its most recent decision, though the version printed in the petition (Pet. App. 1) erroneously omits it.

Petitioner Encino Motorcars, LLC, was defendant in the district court and appellee in the court of appeals.

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INTRODUCTION

The Fair Labor Standards Act of 1938 (FLSA) guarantees employees time-and-a-half pay for work beyond forty hours per week, with certain enumerated exemptions. 29 U.S.C. § 207. For several years beginning in 1961, the statute exempted all automobile dealership employees, but in 1966 (and again in 1974) Congress narrowed the exemption to three enumerated types of auto dealership employees: "salesm[e]n, partsm[e]n, or mechanic[s]." *Id.* § 213(b)(10)(A). The statute further requires that those employees be "primarily engaged in selling or servicing automobiles, trucks, or farm implements." *Id.*

Last Term, this Court invalidated as "procedurally defective" a Department of Labor (DOL) regulation construing this exemption. Pet. App. 39–40. This Court "remand[ed this case] for the Court of Appeals to interpret the statute in the first instance." Pet. App. 44–45. On remand, the court of appeals interpreted the statute as exempting salesmen who sell automobiles and partsmen and mechanics who service them, but not service advisors who at most sell services, not automobiles. Pet. App. 11, 15. In the alternative, the court held that DOL's explanation of its position during the briefing of this case was persuasive, and therefore merited deference under *Skidmore* v. *Swift & Co.*, 323 U.S. 134 (1944). Pet. App. 7 n.3.

The three allegedly contrary appellate decisions (over the past forty-four years) cited by petitioner all arose before DOL's repeated recent explanation of why service advisors do not fall within the salesman/partsman/mechanic exemption. Apart from the decision below, no other court has considered affording *Skidmore* deference to DOL's considered explanation over the past year. In addition, the 1973 case that created the alleged split was decided under a previous version of the statute, later amended by Congress in 1974.

In any event, the decision below will have limited practical import because of the existence of another overtime exemption in the FLSA, which may apply elsewhere even though this one does not. Moreover, DOL could promulgate a new regulation to address the scope of the exemption. Finally, the skeletal record in this case makes it a poor vehicle. Further review is unwarranted.

STATEMENT

A. Statutory and Regulatory Background

1. The FLSA's purpose is to "protect all covered workers from substandard wages and oppressive working hours." *Barrentine* v. *Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728, 739 (1981). Thus, it generally requires employers to pay time-and-a-half for hours worked beyond forty per week. 29 U.S.C. § 207(a)(1). Congress exempted specific types of employees from this overtime-pay mandate. *See* 29 U.S.C. §§ 207, 213.

In 1961, Congress passed a blanket exemption from the FLSA for "any employee of a retail or service establishment which is primarily engaged in the business of selling automobiles." Fair Labor Standards Amendments of 1961, Pub. L. No. 87-30, § 9, 75 Stat. 65, 73 (codified at 29 U.S.C. § 213(a)(19) (1964)). Thus, the law exempted all automobile dealership employees from the overtime-pay requirement, whether they were salesmen, receptionists, managers, mechanics, partsmen, accountants, car washers, or janitors.

2. Five years later, in 1966, Congress narrowed the exemption to three types of dealership employees: "any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles, trailers, trucks, farm implements, or aircraft if employed by a nonmanufacturing establishment primarily engaged in the business of selling such vehicles to ultimate purchasers." Fair Labor Standards Amendments of 1966, Pub. L. No. 89-601, § 209, 80 Stat. 830, 836. Congress re-enacted this provision in 1974, breaking the statutory section into two subsections. Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, § 14, 88 Stat. 55, 65 (adding exemption for boat salesmen and removing it for trailer and aircraft partsmen and mechanics).

3. In 1970, DOL issued an interpretive regulation clarifying that auto dealership service advisors do not qualify for the salesman/partsman/mechanic exemption. 35 Fed. Reg. 5856, 5896 (Apr. 9, 1970) (codified at 29 C.F.R. § 779.372(c)(4) (1971)). DOL noted that service advisors' main tasks of diagnosing automobiles' repair needs, writing up work orders, and assigning and supervising mechanics' work did not make them exempt. *Id.*

4. After some lower courts refused to defer to the 1970 interpretive rule, DOL issued nonbinding en-

forcement materials, declining for a time to enforce the FLSA's overtime provisions with respect to service advisors. Wage & Hour Div., U.S. Dep't of Labor, Opinion Letter No. WH-467, 1978 WL 51403 (July 28, 1978); WAGE & HOUR DIV., U.S. DEP'T OF LABOR, INSERT NO. 1757, FIELD OPERATIONS HANDBOOK 24L04–4(k) (1987).

In 2008, DOL considered formally amending the 1970 interpretive rule to treat service advisors as exempt and issued a notice of proposed rulemaking on the subject. 73 Fed. Reg. 43,654, 43,658–59, 43,671 (July 28, 2008). In 2011, after considering all of the comments submitted, DOL declined to broaden the exemption to include service advisors. It agreed with the majority of commenters that "the exemption should not be extended to employees outside its plain language," such as service advisors, who "merely coordinate" with exempt employees. 76 Fed. Reg. 18,832, 18,838 (Apr. 5, 2011). The final regulation defined "a salesman [as] an employee who is employed for the purpose of and is primarily engaged in making sales or obtaining orders or contracts for sale *of the automobiles*, trucks, or farm implements that the establishment is primarily engaged in selling." 29 C.F.R. § 779.372(c)(1) (emphasis added).

B. Facts and Procedural History

1. Respondents work (or worked) as service advisors for petitioner, a Mercedes-Benz auto dealership in the Los Angeles area. Compl. ¶¶ 9, 10, 15, 18. Their job was to "meet and greet" customers, listen to their complaints, "evaluate the[ir] service and/or repair needs[,] . . . . solicit and suggest that supple-

mental service be performed," and "write up an estimate." *Id.* ¶ 16. Petitioner required them to work from 7:00 a.m. to 6:00 p.m. at least five days per week, totaling a weekly minimum of 55 hours. *Id.* ¶ 15.

2. In 2012, respondents sued petitioner in federal district court, alleging violations of the FLSA and state law. Count One, at issue here, alleged that petitioner violated the FLSA by failing to pay them time-and-a-half for hours worked beyond forty per week. *Id.* ¶¶ 24–31. Petitioner moved to dismiss, arguing that service advisors are exempt from the FLSA's overtime protections under § 213(b)(10)(A).

The district court acknowledged that "the statutory language of § 213(b)(10)(A) does not expressly exempt Service Advisors." Pet. App. 81. Nevertheless, because it saw service advisors as "functionally equivalent to salesmen and mechanics," the district court extended the exemption to service advisors as well. Pet. App. 83. It therefore granted petitioner's motion to dismiss.

3. The court of appeals reversed. Pet. App. 56. The court observed that "[petitioner] concede[d] that [respondents] do not meet the regulatory definitions" of salesmen, partsmen, or mechanics. Pet. App. 59.

Applying *Chevron*'s two-step framework, the court first rejected petitioner's argument that the statute unambiguously exempts service advisors, because it disagreed with petitioner's theory that service advisors are salesmen who service automobiles. Pet. App. 60–62 (applying *Chevron, U.S.A., Inc.* v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984)). At *Chevron* step two, the court found DOL's interpretation of the statute reasonable and therefore entitled to deference. Pet. App. 65–73. The noun "salesman," it noted, relates directly to the gerund "selling," but not to "servicing." Pet. App. 69–70. The court of appeals thus unanimously reversed and remanded for further proceedings. Pet. App. 73.

4. This Court granted certiorari, vacated, and remanded. Pet. App. 31, 45. The Court held that DOL's 2011 regulation did not merit *Chevron* deference because it was "procedurally defective." Pet. App. 39–40, 44 (quoting *United States* v. *Mead Corp.*, 533 U.S. 218, 227 (2001)). While recognizing that DOL could have offered reasons for its 2011 rule, it noted that DOL had in fact offered almost none for its decision to reinstate its original interpretation of the statute. Pet. App. 44. This Court thus vacated and remanded for the court of appeals to construe § 213(b)(10)(A) "without placing *controlling* weight on the Department's 2011 regulation." Pet. App. 44–45 (emphasis added).

5. On remand, the court of appeals read this Court's opinion as a directive to "give no weight to the agency's interpretation" and to "'interpret the statute in the first instance.'" Pet. App. 7 (quoting this Court's decision at Pet. App. 45). The court of appeals "conclude[d] that, under the most natural reading of the statute, Congress did not intend to exempt service advisors." Pet. App. 8; *see also id.* at 30. The legislative history and an FLSA canon of construction provided additional support, but the court noted that it would have reached the same holding even without them. Pet. App. 8, 16, 21 n.14.

The court of appeals also considered DOL's reasoning, as expressed in its briefing in this Court last Term, explaining why the statute does not exempt service advisors. In its alternative holding, the court of appeals concluded that DOL's "present reasoning [is] persuasive and thorough" and merits deference under *Skidmore*. Pet. App. 7 n.3, 30.

REASONS FOR DENYING THE PETITION

There is no need for this Court's review. The decision below is based on and upholds the plain meaning of the statutory salesman/partsman/mechanic exemption. As the first decision to consider *Skidmore* deference to DOL's recent explanation of its interpretation, it does not conflict with any other decision. It also rests on a skeletal record and is of limited importance, as industry commentators themselves acknowledge. Moreover, DOL could promulgate a new regulation that would resolve the issue.

I. Petitioner overstates any division of authority. Of the three federal court of appeals and state supreme court cases cited by petitioner, spanning the past forty-four years, none arose after DOL's recent briefing explaining its position, which merits *Skidmore* deference. Additionally, the original court decision exempting service advisors predated the 1974 FLSA Amendments, which amended and cast light on the provision at issue.

II. The statute unambiguously exempts automobile salesmen, partsmen, and mechanics—but not service advisors. The exemption covers only salesmen, partsmen, and mechanics primarily engaged in selling or servicing automobiles. Service advisors are not automobile salesmen, and selling services does not qualify as selling automobiles. Unlike mechanics and partsmen, service advisors do not service automobiles. Stretching "servicing" to include anyone who is "integral to the process of servicing," as petitioner does (at 1, 11) is inconsistent with Congress's repeal of the blanket automobile dealership exemption in 1966.

It is far more natural to read the statute as providing that salesmen sell automobiles but do not service them; each noun pairs naturally with its corresponding gerund. This Court's longstanding canon of narrowly construing FLSA exemptions simply reinforces the plain import of the text, and in any event was not outcome-determinative here.

III. The question presented is of limited importance. DOL could promulgate a new regulation to address the question presented, so this Court need not intervene. Industry commentators have asserted that another FLSA exemption, 29 U.S.C. § 207(i), may cover most service advisors regardless of § 213(b)(10)(A). Therefore, the outcome of this case would govern at most a finite number of persons in a particular occupational category at particular automobile dealerships; no more generally applicable legal principle is at stake. In addition, this case would make a poor vehicle because its facts are poorly developed. Finally, there is no danger of forum-shopping given the rigorous prerequisites for FLSA collective actions and the individualized showings required by any § 207(i) defense.

I. ANY DISAGREEMENT IS OVERSTATED AND PREDATES DOL'S RECENT, THOROUGH EXPLANATION OF ITS INTERPRETATION OF THE STATUTE

Petitioner claims that the decision below is at odds with the Fifth Circuit's 1973 decision in *Brennan* v. *Deel Motors*, 475 F.2d 1095 (5th Cir. 1973). Pet. 21–22. But *Brennan* predates the 1974 FLSA Amendments, which re-enacted and amended the provision at issue. So the court in *Brennan* had no opportunity to consider how the structure, enactment history, and legislative history of the exemption bear on the question presented. *See* 15–415 Br. for Resp'ts 30–31 (explaining the import of the 1974 FLSA Amendments).

Moreover, *Brennan* rested not on the text of the statute but on the policy argument that "service salesmen are functionally similar to the mechanics and partsmen who service the automobiles." 475 F.2d at 1097. "In the absence of clear intent to the contrary, we can not assume that Congress intended to treat employees with functionally similar positions differently." *Id.* at 1097–98. Indeed, while the Fourth Circuit in *Walton* agreed that service advisors are exempt, it disagreed with the Fifth Circuit's reasoning. The Fourth Circuit recognized that *Brennan*'s "'functionally similar' inquiry cannot be squared with [the] FLSA's plain statutory and regulatory language." *Walton* v. *Greenbrier Ford, Inc.*, 370 F.3d 446, 451 (4th Cir. 2004).

More generally, all three allegedly contrary cases were decided years ago, long before the "persuasive and thorough" reasoning that DOL provided last year in its briefing before this Court. Pet. App. 7

n.3; *see* 15–415 Gov't Br. 14–26; 13–55323 Gov't C.A. Br. 12–34. As this Court noted, before last year DOL had "g[i]ve[n] almost no reasons at all," so earlier courts lacked any expert elucidation of the statute. Pet. App. 44. Though the decision below rested primarily on the court of appeals' "de novo" interpretation of the statute, the court of appeals also relied on *Skidmore* deference to DOL's reasoning as an alternative ground for its decision. Pet. App. 7 n.3, 30.

Petitioner incorrectly asserts that because this Court held that the 2011 regulation was procedurally defective, "issues of deference are off the table." Pet. 3. This Court carefully qualified its vacatur, specifying only that "§ 213(b)(10)(A) must be construed without placing *controlling* weight on the Department's 2011 regulation." Pet. App. 44 (emphasis added). The Court's opinion addressed only the highest level of judicial deference owed to administrative regulations under *Chevron*. Deference under *Skidmore* to DOL's explanation in its briefing was neither argued by the parties nor ruled upon by the Court. Rather than applying *Skidmore*, this Court "remand[ed] for the Court of Appeals to interpret the statute in the first instance." Pet. App. 45. Indeed, this Court cited a passage at the end of *Mead* holding that "the *Skidmore* assessment called for here ought to be made in the first instance by the Court of Appeals." 533 U.S. at 238, *cited with approval in* Pet. App. 45.

The court below is the only one that has considered *Skidmore* deference to DOL's recent briefing. Further percolation is warranted so that other courts may weigh DOL's thorough, recent explanation in the first instance.

II. THE COURT OF APPEALS CORRECTLY HELD THAT SERVICE ADVISORS ARE NOT EXEMPT AUTOMOBILE DEALERSHIP SALESMEN BECAUSE THEY DO NOT SELL AUTOMOBILES

1. The court of appeals correctly held that § 213(b)(10)(A) does not exempt service advisors from the FLSA's overtime requirement. Out of dozens of automobile dealership jobs, including porters, painters, upholsterers, leasing agents, title examiners, car washers, and warranty salesmen, Congress listed only three; service advisor is not one of them.

Moreover, the classification of service advisors was well-established in the industry when Congress enacted the overtime exemption in 1966. U.S. DEP'T OF LABOR, *Automobile Service Advisors, in* OCCUPATIONAL OUTLOOK HANDBOOK, BULLETIN NO. 1450, at 314, 314–17 (1966–67 ed.). As the court of appeals noted, DOL in 1966 enumerated thirteen distinct categories of employees who might work at dealerships, including "automobile mechanics," "automobile parts countermen," "automobile salesmen," and "*automobile service advisors.*" *Id.* at XIII–XVIII, *quoted in* Pet. App. 9 (emphasis added). Service advisors were considered a distinct category, not a subset of "salesmen." Congress chose to exempt three and only three types of employees ("salesman, partsman, or mechanic"), not four and not all thirteen. Pet. App. 9.

That should end the matter, based on the canon *expressio unius est exclusio alterius.* "Where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent." *TRW Inc.* v. *Andrews*, 534 U.S. 19, 28 (2001) (quoting *Andrus* v. *Glover Constr. Co.*, 446 U.S. 608, 616–17 (1980)).

This is a textbook example of *expressio unius*. Congress selected and enumerated certain "members of an 'associated group or series,' justifying the inference that items not mentioned were excluded by deliberate choice, not inadvertence." *Barnhart* v. *Peabody Coal Co.*, 537 U.S. 149, 168 (2003) (quoting *United States* v. *Vonn*, 535 U.S. 55, 65 (2002)). This is doubly true because Congress repealed the 1961 exemption that covered *all* dealership employees and replaced it with an exemption limited to just three enumerated types of employees. It would contradict Congress's manifest intent to expand its carefully enumerated list.

2. Petitioner erroneously asserts, however, that service advisors are clearly covered by the exemption because they are supposedly "salesmen." Pet. 25. That assertion flies in the face of the contemporaneous understanding, noted above, that "service advisors" and "salesmen" were distinct categories of employees in the automobile dealership industry. Moreover, the direct object of the gerund "selling" in the statute is "automobiles"; the statute does not exempt employees primarily engaged in selling leases, warranties, insurance, underbody coatings, or—as petitioner would have it—services. *See, e.g.*, *Chao* v. *Rocky's Auto, Inc.*, No. 01–1318, 2003 WL 1958020, at *1, *4–*5 (10th Cir. Apr. 25, 2003) (unpublished) (declining to exempt finance managers as salesmen

because they sell extended warranty options, not cars); *Gieg* v. *Howarth*, 244 F.3d 775, 776-77 (9th Cir. 2001) (same, for finance writers, because they sell financing and warranties, not cars). Petitioner's own amicus has explained that "[e]mployees primarily engaged in automobile leasing **are not** ***salesmen*** under this exemption, since they are not selling vehicles to ultimate purchasers." NAT'L AUTO. DEALERS ASS'N, A DEALER GUIDE TO THE FAIR LABOR STANDARDS AND EQUAL PAY ACTS 12 (2005) (emphases in original). It is not the court of appeals that has "divide[d] [dealerships'] salesforces into exempt and non-exempt categories," as petitioner argues (at 4); the statute itself limits "salesmen" to employees "selling . . . automobiles." 29 U.S.C. § 213(b)(10)(A).

3. Nor can one stretch the statutory phrase "primarily engaged in . . . servicing automobiles" to mean primarily engaged in selling services, as petitioner would have it. Pet. 29. The Oxford English Dictionary's first definition of "servicing" is "[t]he action of maintaining or repairing a motor vehicle, etc." 15 OXFORD ENGLISH DICTIONARY 39 (2d ed. 1989); *see also* 4 WEBSTER'S NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE 2288 (2d ed. 1956) ("To perform services of maintenance, supply, repair, installation, distribution, etc. for or upon; as, to *service* a car, a radio set, a ship, a territory.") (emphasis in original).

Congress has repeatedly used this common-sense definition of "servicing" in the United States Code. In a statute regulating the Senate garage, for example, "the term 'servicing' includes, with respect to an official motor vehicle, the washing and fueling of such vehicle, the checking of its tires and battery, and checking and adding oil." 2 U.S.C. § 2025(b); *see also, e.g.*, 42 U.S.C. § 7671h(c) ("[N]o person repairing or servicing motor vehicles . . . may perform such service unless such person has been properly trained and certified."). Yet petitioner claims, counterintuitively, that the statute includes the unlikely category of "salesmen primarily engaged in servicing automobiles." Pet. 25. It is far more natural to read the statute as recognizing that salesmen sell automobiles, and other employees service automobiles.

4. Petitioner mischaracterizes the court of appeals' reasoning as improperly injecting the word "personally" into § 213(b)(10)(A). Pet. 16, 19, 33. But the court of appeals used "personally" only once in passing, to emphasize the plain meaning of "servicing." Pet. App. 13.

Rather, it is petitioner who asks this Court to inject a new element into the statute to exempt service advisors, on the theory that they are "an integral part of the servicing process" or "integral to the process of servicing vehicles at the dealership." Pet. 1, 11, 21, 25. But neither the phrase "integral to" nor the word "process" appears anywhere in the statute.

Petitioner's reading is inconsistent with Congress's 1966 repeal of the 1961 blanket dealership exemption that covered all of a dealership's employees. Most employees in a dealership are "integral to the process of [selling or] servicing vehicles at the dealership," including managers, cashiers, lot attendants, porters, and advertising and marketing employees. Indeed, as noted above, many *salesmen* at auto dealerships who sell warranties, financing, leases, and the like may be viewed as an "integral part of the [sales] process." But courts have held that they do not fall within the exemption because they do not sell automobiles. *See* pp. 12–13, *supra*. Instead of maintaining the exemption for all types of employees, Congress deliberately limited it to three enumerated types who sell autos or service them.

5. Petitioner repeatedly suggests that the decision below disregarded the "literal" words of the statute. Pet. 2, 15, 16, 18, 25, 27, 29. That implication ignores entirely the first eight pages of the court of appeals' reasoning. In sections A.1 and A.2 of its opinion, the court closely parsed the phrases "any salesman, partsman, or mechanic" and "primarily engaged in selling or servicing automobiles." Pet. App. 8–16. It held that "the most natural reading of the statute" does not exempt service advisors, and that "[petitioner's] interpretation represents a considerable stretch of the ordinary meaning of the statute's words." Pet. App. 8, 13. The decision below further stated that its "interpretive task could end here, with the words of the statute as commonly understood in 1966." Pet. App. 16.

The court of appeals thus first established the "'ordinary, contemporary, common meaning' of the terms at the time Congress added the relevant clause." Pet. App. 8 (quoting *Perrin* v. *United States*, 444 U.S. 37, 42 (1979) and citing *Taniguchi* v. *Kan Pac. Saipan, Ltd.*, 132 S. Ct. 1997, 2002–04 (2012)). The court then referred to the other "literal," *i.e.*, possible, definitions of the statutory terms to confirm or disconfirm its reading. Pet. App. 16; *see Taniguchi*, 132 S. Ct. at 2003 ("'That a definition is broad enough to encompass one sense of a word does not establish that the word is *ordinarily* understood in that sense.") (emphasis in original). The court concluded that "[t]he most natural reading of the statute" follows the distributive canon, in which "salesman" pairs with "selling" just as "partsman" and "mechanic" pair with "servicing." Pet. App. 18–19 (citing, *inter alia*, ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 214–16 (2012)). The passages of the opinion below cited by petitioner simply explain that there is no need to force every noun to pair with every gerund. Pet. App. 18; *see also* 15–415 Br. for Resp'ts 19–29; *id.* App. D1–D41 (collecting more than 100 federal statutes that follow this distributive canon, including 53 in which the numbers of words in the first list does not equal the number in the second list).

6. Finally, the court of appeals briefly and correctly noted this Court's "'well settled'" and "longstanding rule that the exemptions in § 213 of the FLSA 'are to be narrowly construed against the employers seeking to assert them.'" Pet. App. 20 (quoting *Mitchell* v. *Kentucky Fin. Co.*, 359 U.S. 290, 295 (1959) (Harlan, J.) and *Arnold* v. *Ben Kanowsky, Inc.*, 361 U.S. 388, 392 (1960)). That "longstanding rule" was part of the backdrop against which Congress enacted the 1966 and 1974 FLSA Amendments, so Congress expected the statute to be read in that light.

Nor is there any conflict about whether the canon applies; the Fourth Circuit's decision in *Walton* invoked the same principle. 370 F.3d at 450. Moreover, the decision below expressly stated that its holding did not rest on that canon: "we would reach the same ultimate holding—that the exemption does not encompass service advisors—even if the rule of narrow construction did not apply." Pet. App. 21 n.14.

7. A service advisor's compensation by commission does not make him ineligible for overtime. *Contra* Pet. 28. Though the FLSA does "exclud[e] *certain* employees of retail or service establishments who are paid commissions," *id.* (emphasis added), it contains no blanket exemption from overtime pay for all commission-based employees. On the contrary, employees are exempt only if they fall within a statutory exemption. One exemption is the salesman/partsman/mechanic exemption. Another exemption requires that the employer show that employees (a) work for a "retail or service establishment"; (b) receive more than one-and-a-half times the minimum wage; and (c) receive more than half of their compensation as "commissions on goods or services." 29 U.S.C. § 207(i). Commission-based employees who do not satisfy these requirements are entitled to overtime pay. *See* 29 C.F.R. § 779.416(c) (providing examples of nonexempt commission-based employees). And to qualify for enumerated exemptions such as § 207(i), employers must not only satisfy the statutory prerequisites, but also document them by keeping appropriate records. 29 C.F.R. § 515.16.

Nor does an employer's "negotiated" compensation with employees, Pet. 4, 15, 19, 31, 33—in the sense of having hired employees on terms inconsistent with the FLSA—have any relevance. Employers cannot evade the overtime requirement by paying employees on a piecework or commission basis; unless employees fall within an enumerated exemption, they are entitled to overtime.

III. THE QUESTION PRESENTED IS OF LIMITED SIGNIFICANCE, AS INDUSTRY COMMENTATORS ACKNOWLEDGE, AND THIS CASE IS A POOR VEHICLE FOR ADDRESSING IT

1. Any decision in this case would have limited effect. The decision below addresses only a particular overtime-pay requirement for a particular category of employees at particular kinds of vehicle dealerships. Even as to this limited category of employees, employers may choose alternative ways to qualify for exemption from the FLSA's overtime-pay requirement. Thus, as even industry observers agree, in practice the decision below matters little.

As noted, service advisors may be exempt from overtime pay under § 207(i), the exemption for certain commission-based retail employees. As an industry website asserts, "[c]onsidering that most dealerships pay their service advisers using some sort of commission or flat-rate pay plan specifically designed to qualify the service adviser for the [§ 20]7(i) commissioned sales exemption, . . . the *Navarro* decision likely affects very few, if any, employers." John Huetter, *Sky NOT Falling on Overtime for Service Advisers, Auto Body Estimators after* Navarro, REPAIRER DRIVEN NEWS (Apr. 22, 2015), https://perma.cc/Z96W-QY62. As a law firm reassured its automobile dealership clients, the original panel decision below need not occasion "panic," because "[m]any, if not most, auto dealerships already use commission pay structures for service advisors that comply with . . . Section 207(i)." Scali Law Firm, Navarro *Decision Should Have Little Effect on California Auto Dealers* (Mar. 29, 2015), https://perma.cc/ETD4-MEK5.

As both the opinion of the Court and the concurrence noted, § 207(i) often obviates recourse to the salesman/partsman/mechanic exemption, and 29 U.S.C. § 259(a) guards against retroactive liability for reliance on past agency interpretations. Pet. App. 43; *id.* at 47–48 n.2 (Ginsburg, J., concurring).

Furthermore, there have been only three published federal court of appeals decisions and one state supreme court decision addressing this issue over the last half-century. The paucity of precedent underscores that the question presented is hardly one of national concern.

2. A skeletal record makes this case a poor vehicle. The district court granted petitioner's motion to dismiss before any discovery took place. This Court would thus lack concrete evidence contextualizing service advisors' roles and responsibilities within a particular auto dealership.

3. Moreover, even if the court of appeals' decision were to create confusion or difficulty for auto dealers, DOL could promulgate a new regulation to resolve any disagreement. This Court vacated and remanded only because of a procedural defect in the rulemaking process, Pet App. 40–45, leaving DOL free to issue a new regulation if any further clarification is needed.

4. Finally, petitioner's dire predictions about forum-shopping and nationwide FLSA collective actions are unwarranted. *Contra* Pet. 19, 24, 33. FLSA plaintiffs in collective actions must affirmatively opt in, and they also bear the burden of proving that they are "similarly situated." 29 U.S.C.

§ 216(b). District courts within the Ninth Circuit enforce this burden rigorously, decertifying plaintiffs' classes unless they can "provide[] substantial evidence that their claims arise out of a single policy, custom, or practice that led to FLSA violations." *Beauperthuy* v. *24 Hour Fitness USA, Inc.*, 772 F. Supp. 2d 1111, 1118, 1122 (N.D. Cal. 2011) (collecting citations); *accord Reed* v. *Cty. of Orange*, 266 F.R.D. 446, 449–50 (C.D. Cal. 2010). Because automobile dealerships are often autonomous and the industry is fragmented, collective actions are unlikely to remain certified. *See Brewer* v. *Gen. Nutrition Corp.*, No. 11–CV–3587 YGR, 2014 WL 5877695, at *15 (N.D. Cal. Nov. 12, 2014) ("[E]mployees are not similarly situated in that they are required to work unpaid overtime, if at all, as a result of individual managers' decisions as opposed to a single corporate policy."); *Ellersick* v. *Monro Muffler Brake, Inc.*, No. 10-CV-6525-FPG-MWP, 2017 WL 1196474, at *7 (W.D.N.Y. Mar. 31, 2017) (denying class certification because courts must individualize the FLSA exemption inquiry employee by employee, week by week).

This obstacle is compounded by the possibility that defendants may raise the § 207(i) exemption for certain commission-based retail employees as an affirmative defense to collective action certification. Section 207(i) "is a highly individualized defense because its application requires week-by-week and other periodic calculations . . . specific to each individual Plaintiff and his or her particular circumstances." *Beauperthuy*, 772 F. Supp. 2d at 1126 (internal quotation marks omitted); *accord id.* at 1132–33. "The need for such individualized inquiries would make proceeding by representative testimony impracticable," even against a single nationwide corporate defendant. *Id.* at 1127–28. Thus, district courts within the Ninth Circuit have decertified FLSA collective actions that may implicate § 207(i). *See, e.g., id.* at 1134–35.

The court of appeals rendered its original decision well over two years ago; in the meantime, the sky has not fallen. Petitioner cites no contrary evidence of a rush to file or transfer FLSA suits into the courts below. Nor do petitioner and its amici cite any evidence that the panel decision has actually disrupted dealerships over the past two years. Petitioner's floodgates fears are groundless.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JULY 21, 2017

RECORD
AND
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Supreme Court, U.S.
FILED
AUG - 9 2017
OFFICE OF THE CLERK

No. 16-1362

In the
Supreme Court of the United States

ENCINO MOTORCARS, LLC,

Petitioner,

v.

HECTOR NAVARRO, MIKE SHIRINIAN, ANTHONY PINKINS, KEVIN MALONE, REUBEN CASTRO,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

Respondents' brief in opposition denies the existence of a circuit split (even though the Ninth Circuit expressly acknowledged it was (re-)creating one) and denies the importance of the question presented (even though this Court previously granted certiorari on the exact same issue). That "sounds absurd, because it is." *Sekhar v. United States*, 133 S. Ct. 2720, 2727 (2013). This case remains every bit as certworthy as it was last January in light of both the acknowledged split of authority and the significant consequences of the Ninth Circuit's decision for thousands of dealerships and approximately 100,000 service advisors nationwide. *See* NADA Br.5-7.

Indeed, if anything, this case is even *more* deserving of this Court's review now that the Ninth Circuit has doubled down on its outlying ruling despite this Court's earlier decision. By relying (at this Court's direction) on the text of the FLSA, rather than *Chevron* deference, the Ninth Circuit has made its disagreement with every other court to consider the issue crystal clear and has potentially limited the Labor Department's regulatory options. This Court's intervention is plainly warranted to restore uniformity once and for all to this important area of the law.

I. The Ninth Circuit's Decision Openly Conflicts With The Decisions Of Every Other Court To Consider The Issue.

Before this case, every court to consider the issue, federal and state alike, had uniformly held that service advisors are exempt under §213(b)(10)(A) because they are "salesm[e]n ... primarily engaged in ... servicing automobiles." *See* Pet.20-24; *Walton v. Greenbrier Ford*, 370 F.3d 446 (4th Cir. 2004); *Brennan v. Deel Motors*, 475 F.2d 1095 (5th Cir. 1973); *Thompson v. J.C. Billion*, 294 P.3d 397 (Mont. 2013). The Ninth Circuit recognized as much, expressly acknowledging that its holding "conflicts with published decisions by the Fourth and Fifth Circuits and by the Supreme Court of Montana." Pet.App.30. Indeed, the split between the Ninth Circuit and the Montana Supreme Court is especially stark because it guarantees disparate outcomes *within the same State* depending on whether the FLSA claim is litigated in state or federal court.

In the face of this acknowledged split, Respondents (at 9-11) make the bold assertion that all the conflicting decisions are distinguishable because the Ninth Circuit in a footnote suggested that it would adopt the same outlying interpretation of the FLSA's text if it applied *Skidmore* deference. This argument mimics Respondents' earlier unsuccessful effort to minimize the circuit split because only the Ninth Circuit had invoked *Chevron* deference. *See* Br. in Opp. at 10-14, *Encino Motorcars v. Navarro*, No. 15-415 (Dec. 4, 2015). This reprise should fare no better than the first effort, and indeed is a far weaker basis to dispute the split. This Court's earlier decision in this case directed the Ninth Circuit to address the statutory question without affording the agency's position controlling deference, *see* Pet.App.44, and the Ninth Circuit obliged. The Ninth Circuit stated that "we assume without deciding that *we must give no weight to the agency's interpretation*," Pet.App.7 (emphasis added), and nonetheless reached a conclusion at odds with every other court to consider the statutory question. By reaching the same result sans deference that it previously reached under *Chevron*, the Ninth Circuit eliminated any doubts about the split of authority.

The fact that the court suggested in one sentence in a footnote that it would give *Skidmore* deference to DOL's position if the court were "permitted or required" to do so, Pet.App.7 n.3, hardly changes the analysis. That dictum was avowedly irrelevant to the court's holding; indeed, the Ninth Circuit noted that the level of deference (if any) "does not affect the outcome" of the case. Pet.App.7. More to the point, since *Skidmore* directs a court to afford deference only to the degree its finds the agency's position "persua[sive]," *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944), a footnoted observation that the court would reach the same conclusion by applying *Skidmore* deference adds nothing to the analysis. That the Ninth Circuit found DOL's parallel reasoning "persuasive" is hardly a game-changer and in no way lessens the circuit split. It is simply an indication that the agency has taken the same view of the statute as the Ninth Circuit.

The Ninth Circuit, after all, is not the only court to consider the statutory issue here in light of an articulated DOL position that service advisors were not exempt. The Fifth Circuit in *Brennan v. Deel Motors* rejected DOL's position in the context of an enforcement action brought by the Labor Department itself. There was thus no doubt about DOL's view of the statute and no doubt that the Fifth Circuit found it unpersuasive. DOL's position was similarly rejected in other contemporaneous enforcement actions. *See,* *e.g.*, *Brennan v. N. Bros. Ford*, No. 40344, 1975 WL 1074, at *3 (E.D. Mich. Apr. 17, 1975), *aff'd sub nom. Dunlop v. N. Bros. Ford*, 529 F.2d 524 (6th Cir. 1976) (Table). And there is no material difference between the DOL position the Ninth Circuit found persuasive and the earlier position the Fifth Circuit, *et al.*, found unpersuasive. *See* Br. for United States at 22, *Encino Motorcars v. Navarro*, No. 15-415 (Apr. 6, 2016) (arguing that 2011 DOL regulation "directly tracks the Department's 1970 Interpretive Bulletin's interpretation of 'salesman'"). Finally, while last time around Respondents could at least claim that *Chevron* post-dated the Fifth Circuit's *Deel* decision, *Skidmore* had been on the books for three decades when the Fifth Circuit and every other court to consider the early spate of enforcement actions found DOL's view unpersuasive.

Respondents further assert (at 9) that the Fourth and Fifth Circuits used somewhat different routes to arrive at their shared conclusion that service advisors are exempt. But the fact that all roads outside the Ninth Circuit lead to Rome is hardly a promising ground for denying a split of authority or certiorari. Any nuances in the lower courts' reasoning can be addressed at the merits stage, but the fact that different circuits had slightly different reasons to adopt a view that the Ninth Circuit has twice rejected only underscores the need for plenary review.

Finally, Respondents contend (at 9) that the decision below is not "at odds" with the Fifth Circuit's decision in *Deel Motors* because that case "predates the 1974 FLSA Amendments." But the statutory text *at issue here*—"any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles"—was identical in the 1966 and 1974 versions of the statute. *See* Pet.App.33, 35. And DOL brought and lost enforcement actions before and after the 1974 amendments. *See supra.* The 1974 amendments addressed different issues involving trailer, boat, and aircraft dealerships, and are irrelevant to what Congress intended when it enacted the exemption for *automobile* dealerships in 1966. *See* Reply Br. for Pet'r at 19-20, *Encino Motorcars v. Navarro*, No. 15-415 (Apr. 13, 2016) ("*Encino* Merits Reply Br.").

II. Respondents' Defense Of The Ninth Circuit's Reasoning Fails.

It is no accident that the Ninth Circuit's decision is an outlier, as it rests on an untenable interpretation of §213(b)(10)(A). *See* Pet.24-31. The FLSA exempts from its overtime requirements "any salesman ... primarily engaged in selling or servicing automobiles." Either gerund ("selling" or "servicing") can sensibly be applied to the noun "salesman," and a service advisor is the paradigmatic "salesman ... primarily engaged in ... servicing automobiles." *See* Pet.App.49-54 (Thomas, J., dissenting) ("That text reveals that service advisors are salesmen primarily engaged in the selling of services for automobiles.").

Respondents nonetheless assert (at 11-12) that Congress' failure to use the specific term "service advisors" in the statutory text is somehow dispositive under the canon *expressio unius est exclusio alterius*. But there is no requirement that Congress list every exempt occupation *en haec verba*, and there was no need for Congress to include the specific term "service advisors" when they were amply covered by the broader phrase "any salesman ... engaged in selling or servicing automobiles." 29 U.S.C. §213(b)(10)(A). Indeed, in order to make their *expressio unius* argument, Respondents must rewrite the statute, describing §213(b)(10)(A) as exempting only partsmen, mechanics, and "automobile salesmen." *E.g.*, BIO.8, 12. While Respondents might wish the statute were restricted to "automobile salesmen," the exemption is broader and exempts "*any salesman* ... primarily engaged in selling *or servicing* automobiles." §213(b)(10)(A) (emphasis added).

Equally unavailing is Respondents' contention (at 13-14) that the exemption's use of the term "servicing" somehow excludes service advisors. Even the Ninth Circuit acknowledged that service advisors come within the "literal" text of the exemption. Pet.App.16. Although the Ninth Circuit rejected that literal reading based on a crabbed application of the distributive canon, *see* Pet.App.18-19, "the distributive canon is less helpful in cases such as this because the [three] antecedents and [two] consequents cannot be readily matched on a one-to-one basis." Pet.App.52 (Thomas, J., dissenting); *see also Encino* Merits Reply Br. at 4-7 (explaining that proper application of distributive canon here is to honor all noun-gerund combinations that do not produce a null set).

Contrary to Respondents' suggestion (at 13), the ordinary meaning of "servicing" cannot be limited to "maintaining or repairing a motor vehicle," but also extends to "providing a service." 15 Oxford English Dictionary 39 (2d ed. 1989). And, in all events, "[a] service advisor's selling of service solutions fits both definitions." Pet.App.51 (Thomas, J., dissenting). Moreover, partsmen neither sell nor repair automobiles, yet §213(b)(10)(A) unambiguously exempts them, thereby making clear that the phrase "primarily engaged in ... servicing" must cover some dealership employees who (like both partsmen and service advisors) do not personally perform repairs or maintenance. *See* Pet.33.

Respondents' suggestion (at 14) that exempting service advisors "is inconsistent with Congress's 1966 repeal of the 1961 blanket dealership exemption that covered all of a dealership's employees" likewise disregards the actual text of §213(b)(10)(A). The blanket exemption covered *everyone* working at a dealership, including typically non-exempt employees such as porters, cashiers, and janitors. *See* Act of May 5, 1961, Pub. L. No. 87-30, §9, 75 Stat. 65. Those employees are neither salesmen, partsmen, nor mechanics, and they were exempt in 1961, but not in 1966, and will remain non-exempt no matter how this Court resolves this case.

Finally, Respondents (at 16-17) turn to "that last redoubt of losing causes," *OWCP v. Newport News Shipbuilding*, 514 U.S. 122, 135-36 (1995)—the anti-employer canon that exemptions to the FLSA should be construed "narrowly." That purported canon has no basis in this Court's modern jurisprudence, and in recent years the Court has typically cited it only in the course of declining to apply it. *See, e.g., Sandifer v. U.S. Steel*, 134 S. Ct. 870, 879 n.7 (2014) (reserving question of whether Court should "disapprove" anti-employer canon); *Christopher v. SmithKline Beecham*, 567 U.S. 142, 164 n.21 (2012) (canon does not apply to FLSA's definitions); *see also* Pet.App.53-54 (Thomas, J., dissenting). The fact that Respondents (and the Ninth Circuit) needed to invoke the dubious anti-employer canon to buttress their interpretation of §213(b)(10)(A) just gives this Court one more reason to grant review and underscores the Ninth Circuit's strained interpretation of the statutory text.

III. This Case Remains An Ideal Vehicle To Address The Scope of §213(b)(10)(A).

No less than last time around, this case—which raises the same question on which this Court granted certiorari last January—presents an excellent vehicle for the Court to resolve an acknowledged circuit split over whether tens of thousands of service advisors are exempt from the FLSA's overtime-pay requirements. Respondents persist in seeking to impose significant retroactive FLSA liability on employers who have done nothing more than pay workers in conformity with long-settled industry practice. This Court has repeatedly found such attempts worthy of plenary review and rejection. *See, e.g.*, *Integrity Staffing Sols. v. Busk*, 135 S. Ct. 513 (2014); *Christopher*, 567 U.S. 142.

As amici explain, there are more than 18,000 franchised car dealerships nationwide, which collectively employ approximately 100,000 service advisors. *See* NADA Br.5-7 & n.5. Those dealerships and their employees have negotiated mutually beneficial compensation plans in good-faith reliance on the unbroken line of authority spanning four decades finding service advisors exempt. If allowed to stand, the Ninth Circuit's decision would require dealerships and their employees to rework their longstanding relationships in ways that will be harmful to both and will do nothing to advance the purposes of the FLSA.

Respondents nonetheless contend that this Court's review is unnecessary because (1) service advisors might also fall within the more general exemption for commissioned employees under §207(i); (2) there have been few recent cases addressing whether service advisors are exempt; and (3) there are other limitations on FLSA claims that will deter vexatious litigation. BIO.18-20. But this Court granted certiorari over those *precise* objections just last year, and Respondents do not argue that anything has changed in the meantime. *See* Br. in Opp. at 26-28, No. 15-415 (raising same arguments, unsuccessfully, in opposition to certiorari).

First, the potential availability of a different—more general and more burdensome, *see* NADA Br.15-16—exemption cannot justify ongoing disuniformity over the scope of §213(b)(10)(A). Indeed, in both this case and *Christopher*, the Court granted certiorari to resolve a circuit split regarding one of the FLSA's enumerated exemptions notwithstanding the potential availability of another exemption. *See, e.g.*, Br. for United States at 16 n.3, *Christopher v. SmithKline Beecham*, No. 11-204 (Feb. 6, 2012) (arguing that the employees in question would potentially qualify for exemptions under "other provisions of the FLSA" in addition to the exemption at issue).

Second, Respondents (at 19) bemoan the recent "paucity of precedent" regarding the scope of

§213(b)(10)(A). But plaintiffs had no great temptation to bring such cases before the 2011 DOL regulation because, for more than forty years, *every court* to consider the issue had found service advisors to be exempt. Yet now that one pioneering set of plaintiffs has procured an outlying circuit precedent—by the most populous circuit in the Nation, no less—there will be no shortage of plaintiffs willing to seek windfall recoveries for long-established compensation practices.

Third, Respondents (at 19-21) offer vague assurances that other FLSA provisions may lessen the threat of collective actions or the sting of retroactive liability. For example, they assert (at 20) that it may be difficult to certify a collective action in light of "autonomous" dealerships and a "fragmented" industry. Notably, however, Respondents do not forswear seeking certification of a collective action *in this case*. So, too, with Respondents' invocation of 29 U.S.C. §259(a), which we are told "guards against retroactive liability for reliance on past agency interpretations." BIO.19. But while Respondents invoke §259(a) in an attempt to avoid plenary review, they stop short of conceding that §259(a) would bar retroactive liability in this case or in any other.

Finally, Respondents assert (at 19) that this Court's intervention is unnecessary because DOL is "free to issue a new regulation" that could offer "further clarification." But that option is almost always available when the circuits are split in interpreting a statute overseen by a federal agency, and yet this Court routinely grants certiorari to resolve such circuit splits. *See, e.g., Sandifer*, 134 S.

Ct. 870 (FLSA §203(o)). Moreover, now that the Ninth Circuit has offered its definitive interpretation of §213(b)(10)(A) giving "no weight to the agency's interpretation," Pet.App.7, DOL's interpretative options are more constrained than in the ordinary case. Respondents and other plaintiffs would almost certainly argue that the Ninth Circuit's decision amounts to a step-one determination of the statute's meaning and *forecloses* DOL from reaching any other result.[1] Thus, if anything, the Ninth Circuit's latest sans-deference ruling limits the options for regulatory change and magnifies the importance of this Court's review.

* * *

In sum, Respondents may not believe the issue presented here to be significant, but Congress deemed the treatment of certain dealership employees sufficiently important to provide a specific exemption for them, and this Court has already found it worthy of plenary review. None of that has changed now that the Ninth Circuit has doubled down on its outlying result. This Court should not allow a single circuit to render §213(b)(10)(A) a dead letter for service advisors, and should once again grant certiorari to resolve the ongoing circuit conflict and make clear that service advisors are covered by the exemption's plain text regardless of the location of their employer.

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[1] To be sure, if DOL promulgated a new regulation finding service advisors to be non-exempt, opponents of that rule would have a strong argument that DOL's position was foreclosed by precedent in the Fourth, Fifth, and Sixth Circuits. The fact that *both* sides would be able to seek review of an adverse DOL ruling in a circuit with favorable precedent only underscores why this Court's review is imperative.

CONCLUSION

This Court should grant the petition for certiorari.

Respectfully submitted,

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August 9, 2017

Supreme Court, U.S.
FILED
JUN 12 2017
OFFICE OF THE CLERK

No. 16-1362

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Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR AMICI CURIAE NATIONAL AUTOMOBILE DEALERS ASSOCIATION AND STATE AUTOMOBILE DEALERS ASSOCIATIONS FOR ALASKA, ARIZONA, CALIFORNIA, HAWAII, IDAHO, MONTANA, NEVADA, OREGON AND WASHINGTON STATE IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether "service advisors" at automobile and truck dealerships are exempt from the overtime pay requirements of the Fair Labor Standards Act under 29 U.S.C. § 213(b)(10)(A), which provides an exemption for "any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles [or] trucks."

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IDENTITY AND INTEREST OF AMICI CURIAE

The National Automobile Dealers Association (NADA), and nine state motor vehicle dealers associations for states in the Ninth Circuit (the "State Dealers Associations"), respectfully submit this brief amicus curiae in support of Petitioner Encino Motorcars, LLC.[1] Amicus curiae are 501(c)(6) non-profit trade associations representing franchised automobile and truck dealerships nationally and in each of the states comprising the Ninth Circuit, whose members are significantly impacted by the Ninth Circuit's decision, and as such, have a keen interest in the issues presented.

National Automobile Dealers Association

NADA is a national non-profit trade organization, incorporated in the State of Delaware. Founded in 1917, NADA serves and represents franchised new motor vehicle[2] dealers nationwide. Its members sell new motor vehicles and related goods and services as authorized dealers of various motor vehicle manufacturers and distributors doing business in the United States. There are more than 18,000 franchised motor vehicle dealerships in the United States. Of those, more than 16,000 are members of NADA. As an organization, NADA informs members about relevant legal and regulatory issues and closely monitors federal statutes, state statutes, and court rulings interpreting such laws. NADA appears before and submits briefs to courts and other tribunals as amicus curiae to advocate interpretations of federal and state statutes that will advance the interests of its members as a group.

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[1] Pursuant to this Court's Rule 37.3(a), all parties have consented to the filing of this brief. Counsel of record for both Petitioner and Respondent received notice at least ten days prior to the due date of this brief of Amici's intention to file an amicus brief. Pursuant to Rule 37.6, Amici Curiae affirm that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amici curiae, their members, or their counsel made a monetary contribution to its preparation or submission.

[2] Amici's members are comprised of both automobile and truck dealerships, referred to collectively in this brief as "motor vehicle dealerships."

State Dealers Associations

The following State Dealers Associations join as amici in this brief: Alaska Automobile Dealers Association; Arizona Automobile Dealers Association; California New Car Dealers Association; Hawaii Automobile Dealers Association; Idaho Automobile Dealers Association; Montana Automobile Dealers Association; Nevada Franchised Auto Dealers Association; Oregon Automobile Dealers Association; and Washington State Auto Dealers Association. Each is a registered non-profit trade organization, representing new car and truck dealerships in the state. Collectively, the State Dealers Associations represent 90% of the more than 2,500 dealerships in the nine states comprising the Ninth Circuit. Their members are franchised retail sellers of new motor vehicles and related goods and services, serving as authorized dealers for motor vehicle manufacturers and distributors.

Each State Dealers Association provides services to its members on a state-wide basis, similar to those provided by NADA nationally. These services include informing members about relevant legal and regulatory issues and closely monitoring federal statutes, state statutes, and court rulings interpreting such laws. Each of the State Dealers Associations appears before and submits briefs to courts and other tribunals as amicus curiae to advocate interpretations of federal and state statutes that will advance the interests of its members as a group.

This case raises issues of immense practical significance to amici and their dealership members. The Ninth Circuit's decision, if allowed to stand, will have an adverse impact on all franchised motor vehicle dealers nationally, as it forecloses the availability of an overtime exemption on which dealerships and their employees have relied in structuring their compensation plans for more than 40 years.

INTRODUCTION AND SUMMARY OF ARGUMENT

For more than 40 years, the nation's motor vehicle dealerships have relied on the overtime exemption in section 13(b)(10) of Fair Labor Standards Act (FLSA) for "any salesman . . . primarily engaged in selling or servicing automobiles or trucks" in classifying and compensating their Service Advisors.[3] The exemption has allowed dealerships to compensate Service Advisors – who are engaged in the sale of service solutions to dealership customers – based substantially on their sales productivity rather than on the number of hours they work. These compensation arrangements benefit both dealerships and employees, and Service Advisors are generally well paid for their contributions to dealership revenues.

Dealerships have relied not only on the statutory language of the exemption, but as important, on a solid wall of judicial authority interpreting its scope. Until the Ninth Circuit's decisions in this case, every federal and state court, including several circuit courts of appeals, held that that the statutory exemption encompasses Service Advisors.

The Ninth Circuit's decision rejecting the applicability of the exemption to these well compensated employees is an outlier, threatening to disrupt what was previously a settled, widely accepted compensation practice in the nation's franchised motor vehicle dealerships.

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[3] We use the generic title "Service Advisor," but the position is also known as Service Writer or Service Salesman, among other titles.

The impact of the Ninth Circuit's decision cannot be overstated. Every franchised dealership across the country operates a service department that employs Service Advisors.[4] Franchised automobile and truck dealerships (*i.e.*, motor vehicle dealerships) nationwide together employ more than 100,000 Service Advisors,[5] the vast majority of whom are classified as overtime-exempt, typically under section 13(b)(10). The Ninth Circuit's decision invalidates the longstanding practice of classifying Service Advisors under this statutory exemption within the Ninth Circuit and creates significant uncertainty about Service Advisors' exempt status nationwide, raising the specter of unanticipated liability for past pay practices and windfalls to these well compensated sales employees. If allowed to stand, the decision below will cause disruption and upheaval to dealerships and employees alike, because it will force dealerships to restructure Service Advisors' compensation to avoid that liability going forward.

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[4] On average, light-duty automobile dealerships employ an estimated 5.7 Service Advisors each. National Automobile Dealers Assn., *NADA Data 2016: Annual Financial Profile of America's Franchised New-Car Dealerships* (2016) ("*2016 NADA Data*"). Commercial truck dealerships employ an estimated 3.5 Service Advisors each. National Automobile Dealers Assn., *ATD Data 2016: Annual Financial Profile of America's Franchised New-Truck Dealerships* ("*2016 ATD Data*").

[5] In amicus briefs filed by amici the last time this case came before this Court, NADA estimated that 45,000 Service Advisors were employed in dealerships nationwide. Based on a new review by expert data analysts and data collected for the *2016 NADA Data* and *2016 ATD Data* reports, cited above, NADA has concluded that is previous estimate significantly understated the actual number of Service Advisors employed nationally.

Certiorari is clearly warranted to resolve the circuit split on this issue and to clarify the scope of this key exemption for the nation's motor vehicle dealerships.

ARGUMENT

I. Service Advisors Are Key Contributors to the Revenues of Franchised Motor Vehicle Dealerships, and Have Been Classified as Exempt Sales Employees for Four Decades.

There are more than 18,000 franchised motor vehicle dealerships in the United States, the great majority of which are represented by amici. Nationally, franchised dealerships together employ an estimated 1.2 million people and have an estimated annual payroll of nearly $70 billion.[6] At the same time, the overwhelming majority are small businesses as defined by the Small Business Administration.

Every franchised motor vehicle dealership in the country has a service department. Service departments provide expert vehicle maintenance and repair services to dealership customers, and are a key revenue and profit center for dealerships. No position is more crucial to the vehicle service function than the Service Advisor. Service Advisors evaluate customers' service and repair needs, help diagnose mechanical problems, advise customers about services to address specific problems, provide information about optional and supplemental services, work intimately with dealership mechanics, and ensure the customer is satisfied with the service received. *In short, Service Advisors are engaged in selling service, maintenance and repairs through the customer relationships they cultivate on a day-to-day basis.* They are quite simply indispensable to the servicing of automobiles and trucks at dealerships.

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[6] *2016 NADA Data* at 33, 35; *2016 ATD Data* at 6, 16.

NADA estimates that 100,000 Service Advisors are employed in franchised dealerships across the United States. According to compensation data compiled by NADA, Service Advisors are well compensated. In 2015 the average annual compensation for Service Advisors employed in automobile dealerships nationwide was $64,635, with the top 10% earning on average more than $97,335 per year.[7] Compensation levels are higher at automobile dealerships in the Ninth Circuit states (Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon and Washington), where the annual average is $68,995, and the top 10% earn on average $103,560 per year.[8]

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[7] National Automobile Dealers Assn., *2016 Dealership Workforce Study: Automotive Retail National & Regional Trends in Compensation, Benefits & Retention* (NADA 2016) (hereafter "*NADA 2016 Workforce Study*") at 11. The top 10% compensation figure is based on NADA's unpublished analysis of 2015 data collected for the *2016 Workforce Study*.

Service Advisors are universally classified as exempt from overtime, typically under section 13(b)(10) of the FLSA, which exempts "salesmen . . . primarily engaged in selling or servicing automobiles or trucks."[9] The 13(b)(10) exemption requires nothing other than that the employee work in a sales or servicing role at the dealership. It thus provides flexibility in terms of compensation structure and level, including arrangements that involve a generous and predictable base wage combined with the option for incentive pay as an upside to sales productivity.

II. For More Than 40 Years, Motor Vehicle Dealerships Have Relied on Authoritative Interpretations of the Section 13(b)(10) Exemption in Classifying and Compensating Their Service Advisors.

Because of the importance of the 13(b)(10) exemption to franchised dealerships, in the 40-plus years since the exemption was enacted, amici have closely tracked judicial and agency interpretations addressing its meaning and scope. Until the Ninth Circuit's 2015 and 2017 decisions in this case, federal and state courts had uniformly interpreted the exemption to encompass Service Advisors. Looking to the language of the statutory exemption itself, these courts uniformly rejected DOL's 1970 interpretive guidance that Service Advisors did not fall within the section 13(b)(10) exemption. For some 40 years, the DOL acquiesced in these judicial decisions. And based on that consistent, authoritative interpretation, for the last 40 years amici have advised their members that Service Advisors qualify for the section 13(b)(1) exemption and need not be paid overtime. Amici's member dealerships have entered into countless compensation arrangements with their Service Advisors based on this settled understanding of the law.

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[8] Unpublished NADA analysis of 2015 data collected for *2016 Workforce Study*.

[9] 29 U.S.C. § 213(b)(10).

The section 13(b)(10) exemption was originally enacted in 1966.[10] In 1970, the DOL promulgated interpretive regulations that ignored the literal language of the statute and narrowed the exemption by defining "salesman" as "an employee who is employed for the purposes of and is primarily engaged in making sales or obtaining orders or contracts for sale of [vehicles]."[11] Indeed, the regulation went on to explicitly *exclude* Service Advisors from the exemption, although recognizing that their principle functions included "diagnosing the mechanical problems of vehicles brought in for repair, . . . and directing and checking on the work of mechanics."[12]

In the litigation that inevitably followed, the DOL's 1970 interpretive guidance was soundly and consistently rejected by the courts. Beginning with the 1973 decision of the Fifth Circuit in *Brennan v. Deel Motors, Inc.*,[13] and up until the Ninth Circuit's 2015 decision in this case, the decisions of federal circuit courts,[14] federal district courts,[15] and state courts[16] uniformly held that Service Advisors are covered by the exemption.

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[10] Pub. L. No. 89-601, 80 Stat. 830 (1966).

[11] 29 C.F.R. § 779.372(c)(1) (1971).

[12] *Id.* § 779.372(c)(4).

In the face of consistent judicial rejection of its 1970 interpretive regulation, the DOL acquiesced to the courts' interpretation. In 1978 it rescinded its regulatory guidance, issuing an Administrator Opinion squarely declaring that "service writers, service advisors, service managers, or service salesmen" qualify as "salesmen" for purposes of the exemption, and are exempt when the majority of their sales in dollar volume is for non-warranty work.[17] In 1987, the DOL revised its enforcement bible, the Wage & Hour Field Operations Handbook (FOH), to reflect that opinion and to incorporate the judicial authority on which it was based.[18] The FOH noted the DOL's intention to revise its regulations at 29 C.F.R. section 779.372 "as soon as is practicable" to reflect the judicial interpretation of the exemption.

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[13] 475 F.2d 1095 (5th Cir. 1973).

[14] *Deel Motors*, 475 F.2d 1095; *Walton v. Greenbrier Ford, Inc.*, 370 F.3d, 446 (4th Cir. 2004); *see Bonner v. City of Prichard*, 661 F.2d 1206 (11th Cir. 1981) (adopting 5th Circuit decisions prior to 9/30/81 as controlling precedent).

[15] *Clark & Day v. Palmen Motors*. No. 98-C-0548 (E.D. Wisc. 1988); *Dayton v. Coral Oldsmobile, Inc.*, 684 F. Supp. 290 (S.D. Fla. 1988); *Yenney v. Cass County Motors*, No. 76-0-294, 1977 WL 1678 (D. Neb. Feb. 8, 1977); *Brennan v. Import Volkswagen, Inc.*, No. W-4982, 1975 WL 1248 (D. Kan. Oct. 21, 1975); *Brennan v. North Bros. Ford, Inc.*, No. 40344, 1975 WL 1074 (E.D. Mich. Apr. 17, 1975), *aff'd sub nom., Dunlop v. North Bros. Ford, Inc.* , 529 F.2d 524 (6th Cir. 1976) (Table).

[16] *Thompson v. J.C. Billion, Inc.*, 368 Mont. 299 (Mont. 2013).

[17] U.S. Dep't of Labor, Wage & Hour Op. Ltr. WH-467, 1978 WL 51403 (July 28, 1978).

Ten years later, in 2008, the DOL issued proposed regulations to formally codify the judicial interpretations of the section 13(b)(10) exemption as encompassing Service Advisors and confirming the agency's acquiescence to these interpretations over the previous three decades.[19] In 2011, however, the DOL abruptly reversed course, issuing a Final Rule that reneged on its long-held position and 2008 proposal and revived its judicially-rejected 1970 position that the exemption covers only those dealership salesmen who sell vehicles.[20]

III. Litigation Arising from the DOL's Final Rule Has Created Uncertainty and Opened an Entire Industry to Unanticipated Liabilities.

The 2011 Final Rule began the current era of uncertainty for franchised motor vehicle dealerships nationwide. Litigation was inevitable and not long in coming. In 2012, the year after the Final Rule was promulgated, the plaintiff Service Advisors in this case filed their challenge to their classification under the section 13(b)(1) exemption. The District Court refused to defer to the DOL's new position, rejecting it as inconsistent with the statutory language and Congressional intent.[21] The Ninth Circuit reversed, deferring to the agency's 2011 interpretation.[22] This Court granted certiorari and in a 2016 opinion vacated the Ninth Circuit's decision, holding that it had erred in placing controlling weight on the DOL's 2011 Final Rule. No deference was owed to the DOL's new interpretation, this Court held, in part because in adopting it, the DOL had disregarded "decades of industry reliance on the Department's prior policy" in "negotiat[ing] and structur[ing] their compensation plans."[23]

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[18] U. S. Dep't of Labor, Wage & Hour Div., *Field Ops. Handbook* § 24L04(k) (October 20, 1987).

[19] 73 Fed. Reg. 49621, 43659, 43671 (July 28, 2008).

[20] *See* Updating Regulations Issued under the FLSA, 76 Fed. Reg. 18832, 18859 (Apr. 5, 2011).

On remand, the Ninth Circuit affirmed its original opinion that Service Advisors are not encompassed within the section 13(b)(10) exemption, this time avoiding reference to the DOL's 2011 interpretive regulation. The Ninth Circuit rejected a literal reading of the statute, which it admitted would encompass Service Advisors, as inconsistent with Congressional intent. Nowhere did the court mention, much less consider, the reliance interests of an entire industry on 40 years of consistent judicial and agency authority, despite this Court's extensive discussion of reliance interests in its previous opinion in this case. Instead, the Ninth Circuit simply stated that it disagreed with the decisions of its sister circuits "for the reasons stated in our earlier opinion (except those reasons concerning deference to the agency)."[24] The Ninth Circuit's most recent decision thus perpetuates the circuit split that previously led this Court to grant certiorari, and exacerbates the resulting uncertainty for more than 18,000 motor vehicle dealerships across the country. This untenable state of affairs can only be resolved by this Court.

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[21] Pet.App.83.

[22] Pet.App.55-73.

[23] Pet.App.42.

IV. The Ninth Circuit's Decision Creates Unanticipated Liabilities and Future Uncertainties for the Nation's Motor Vehicle Dealerships and Threatens to Disrupt Longstanding Compensation Arrangements.

Based on the consistent authoritative interpretations of the section 13(b)(10) exemption over the last 40 years, amici NADA and State Automobile Dealers Associations have long advised their members that Service Advisors are encompassed within the FLSA's 13(b)(10) exemption. In turn, automobile dealerships across the country have relied on that advice to structure their compensation and recordkeeping practices accordingly. The Ninth Circuit's decision, if allowed to stand, would upend these longstanding industry practices and potentially create unanticipated retroactive liability for past practices. At a minimum, the decision below would lead to widespread disruption for motor vehicle dealerships. The impact of this decision in the real world of brick-and-mortar dealerships cannot be overstated.

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[24] Pet.App.30.

This is particularly true for dealerships within the Ninth Circuit. There are more than 2,500 dealerships in the nine states comprising the Circuit. As a result of the Ninth Circuit's decision, dealerships in these states that have relied solely on the 13(b)(10) exemption in classifying and compensating their Service Advisors now face unanticipated overtime liability. In making the exemption unavailable, the decision puts these dealerships at risk for private FLSA back pay claims.

The impact of the decision below will be felt outside of the Ninth Circuit as well. Multi-state dealerships with operations within and outside of the Ninth Circuit – of which there are many – could be particularly hard-hit by national FLSA collective action litigation filed in Ninth Circuit district courts. The Circuit's outlier decision is sure to encourage such forum shopping. But even dealerships without operations in the Circuit will feel the decision's impact, as it will all-too-predictably inspire fresh challenges to exempt status in jurisdictions without controlling circuit precedent.

The uncertainty and impetus to forum shop arising from the circuit split can only be resolved by a grant of certiorari and reversal of the decision below. And without a reversal by this Court, dealerships both within and outside of the Ninth Circuit that have relied on the section 13(b)(10) exemption in classifying their Service Advisors will face unanticipated liability for past violations, which at the time were not considered violations at all. If the exemption is foreclosed, these dealerships will be subject to private FLSA back pay claims and significant potential liability, given that the national average workweek for Service Advisors is about 45 hours.[25] In addition to unpaid overtime liability for about five hours per week for each Service Advisor going back up to three years, dealerships could face liability for liquidated damages equal to unpaid overtime, interest and attorney's fees.[26] Potential liability across the industry could swiftly approach many hundreds of millions of dollars.

This specter is very real. Contrary to the previous "no-big-deal" arguments made by Respondents the last time this issue came before this Court, the FLSA's section 7(i) exemption for certain commissioned employees will be unavailable to a significant portion of the nation's dealerships with respect to past liability. That exemption has multiple technical requirements concerning type of business, compensation structure and hourly wage average, each of which must be satisfied.[27] Heretofore, dealerships have had no need to consider these requirements in structuring their pay and timekeeping practices due to the simplicity of section 13(b)(10), which has no such technical requirements.

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[25] *NADA 2016 Workforce Study* at 115. These weekly hours are consistent with the hours worked by exempt vehicle salespersons. *Id.*

[26] 29 U.S.C. § 216(b).

[27] The section 7(i) exemption applies only to employees who (i) work in retail or service establishments; (ii) earn more than 1.5 times the minimum wage for all hours worked; and (iii) are paid commissions that comprise more than 50% of total compensation. 29 U.S.C. § 207(i); *see Gieg v. DRR, Inc.*, 407 F.3d 1038, 1044-47 (9th Cir. 2005).

The section 7(i) exemption, for example, is not available to dealerships whose compensation plans have been structured to provide more generous base compensation in comparison to commissions. And it will be difficult to establish for those dealerships that did not keep time records showing that their Service Advisors' average hourly compensation meets the 7(i) requirement of exceeding 1.5 times the minimum wage for each and every hour worked. Finally, the section 7(i) exemption is not available to dealerships that do not qualify as "retail establishments" due to their mix of revenue sources, when over 25% of revenues comes from non-retail sales, such wholesale fleet sales.

The uncertainty spawned by the Ninth Circuit's decision will also have potential impacts on employees themselves, as dealerships begin radically restructuring previously agreed-upon compensation arrangements to avoid future liability. Many, at least those who qualify as retail establishments, may restructure Service Advisor compensation to allocate a greater proportion to commissions in an attempt to meet the 7(i) exemption, thus placing more wages at risk, a disadvantage to employees in lean economic times. Others will put Service Advisors on an hourly pay plan, paying overtime but lowering or even doing away with commissions, thus eliminating some or all of the upside advantage provided to employees through performance-based commission systems. There is nothing more disruptive to an employee than changing her compensation plan, even when the result is that her net income is roughly equivalent or even greater.

Unless resolved by this Court, the circuit split spawned by the Ninth Circuit's decision will continue to engender uncertainty. Unless reversed, the decision will create significant unanticipated liability for dealerships that have relied on the section 13(b)(10) exemption in the past. The disruption will extend to Service Advisors themselves going forward, who will find their compensation plans changed in ways that may not ultimately benefit them.

V. The Petition for Certiorari Should Be Granted Because the Decision Creates a Conflict with Every Other Circuit as to the Scope of the Section 13(b)(10) Exemption.

Given the substantial questions about the correctness of the Ninth Circuit's decision, and the negative impact of the uncertainty it creates on motor vehicle dealerships nationally, the petition should be granted to resolve a conflict among the circuits on an important matter.

Only a grant of certiorari and resolution by this Court can avoid the inequity that a circuit conflict creates, because until then, the parties' rights and duties depend upon where a case is litigated. And left unresolved, circuit conflicts feed on themselves, generating additional litigation in the other circuits.

The Ninth Circuit's decision conflicts with the decisions of all of the circuits that have considered the applicability of the section 13(b)(10) exemption to service providers: the Fifth Circuit's decision in *Brennan v. Deel Motors, Inc.*,[28] the Fourth Circuit's decision in *Walton v. Greenbrier Ford, Inc.*,[29] and the Eleventh Circuit's adoption of the *Deel Motors* decision pursuant to *Bonner v. City of Prichard*.[30] It also conflicts with the numerous federal district and state appellate court decisions in these and other circuits, including the Montana Supreme Court's *Thompson v. J.C. Billion*[31] decision. Indeed, the Ninth Circuit stands alone in holding that Service Advisors are not encompassed within the section 13(b)(10) exemption as a matter of law.

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[28] 475 F.2d 1095.

[29] 370 F.3d, 446 (4th Cir. 2004).

[30] 661 F.2d 1206 (11th Cir. 1981) (adopting 5th Circuit decision prior to 9/30/81 as controlling precedent).

[31] 368 Mont. 299.

CONCLUSION

The nation's motor vehicle dealerships have relied on more than four decades of settled law in structuring their compensation arrangements with Service Advisors. The Ninth Circuit's decision not only calls the legality of these arrangements into question, it also creates a conflict with every other circuit to have addressed the section 13(b)(1) exemption for Service Advisors. Given the national scope of the issue, and the many inequities and disruptions resulting from the circuit conflict, certiorari is both appropriate and necessary. Amici curiae urge the Court to grant Petitioner Encino Motorcars' Petition for Certiorari.

Respectfully submitted,

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AND
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FILED
NOV 1 - 2017

NO. 16-1362

In the
Supreme Court of the United States

ENCINO MOTORCARS, LLC,
Petitioner,
v.
HECTOR NAVARRO, MIKE SHIRINIAN, ANTHONY PINKINS, KEVIN MALONE, REUBEN CASTRO,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

JOINT APPENDIX

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November 1, 2017

Petition for Writ of Certiorari Filed May 10, 2017
Petition for Writ of Certiorari Granted September 28, 2017

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The following opinions, decisions, judgments, and orders have been omitted in printing this joint appendix because they appear on the following pages in the appendix to the Petition for Certiorari:

Appendix A

Opinion of the United States Court of Appeals for the Ninth Circuit, *Hector Navarro; Anthony Pinkins; Kevin Malone; and Reuben Castro v. Encino Motorcars, LLC*, No. 13-55323 (Jan. 19, 2017)........................ App-1

Appendix B

Opinion of the Supreme Court of the United States, *Hector Navarro; Anthony Pinkins; Kevin Malone; and Reuben Castro v. Encino Motorcars, LLC*, No. 15-415 (June 20, 2016) App-31

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Appendix D

Order of the United States Court of Appeals for the Ninth Circuit Denying Rehearing En Banc, *Hector Navarro, et al. v. Encino Motorcars, LLC*, No. 13-55323 (June 1, 2015) App-74

Appendix E

(In Chambers) Order Re: Defendant's Motion to Dismiss of the United States District Court for the Central District of California, *Navarro, et al. v. Mercedes Benz of Encino*, No. 2:12-cv-08051-RGK-MRW (Jan. 25, 2013) App-76

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 13-55323

HECTOR NAVARRO; MIKE SHIRINIAN; ANTHONY PINKINS; KEVIN MALONE; REUBEN CASTRO,

v.

ENCINO MOTORCARS, LLC, erroneously sued as Mercedes Benz of Encino.

DOCKET ENTRIES

Date Filed	#	Docket Text
02/26/2013	1	DOCKETED CAUSE AND ENTERED APPEARANCES OF COUNSEL. SEND MQ: Yes. The schedule is set as follows: Mediation Questionnaire due on 03/05/2013. Transcript ordered by 03/27/2013. Transcript due 06/25/2013. Appellants Reuben Castro, Kevin Malone, Hector Navarro and Anthony Pinkins opening brief due 08/05/2013. Appellee Encino Motorcars, LLC answering brief due 09/04/2013. Appellant's optional reply brief is due 14 days after service of the answering brief. [8526738] (BG) [Entered: 02/26/2013 10:26 AM]

Date Filed	#	Docket Text
02/26/2013	2	Filed representation notice of S. Keven Steinberg for Appellants. Served on 02/25/2013. [8526758] (BG) [Entered: 02/26/2013 10:33 AM]
03/01/2013	3	Filed (ECF) Appellants Reuben Castro, Kevin Malone, Hector Navarro and Anthony Pinkins Mediation Questionnaire. Date of service: 03/01/2013. [8534359] (Steinberg, Keven) [Entered: 03/01/2013 06:28 PM]
03/05/2013	4	Filed (ECF) Appellee Encino Motorcars, LLC Mediation Questionnaire. Date of service: 03/05/2013. [8537663] (Scherwin, Todd) [Entered: 03/05/2013 02:21 PM]
06/13/2013	5	Filed order MEDIATION (BS): The Mediation Program of the Ninth Circuit Court of Appeals facilitates settlement while appeals are pending. See Fed. R. App. P. 33 and Ninth Cir. R. 33-1. The court has scheduled a telephone settlement assessment conference, with counsel only, on June 25, 2013, at 10:00 a.m. PACIFIC (San Francisco) Time to discuss whether this case is appropriate for participation in the

Date Filed	#	Docket Text
		Mediation Program. The Circuit Mediator will initiate the conference call by contacting each person on the attached list of participants at the telephone number listed. Please be available for the call at least five minutes before the scheduled time. Counsel should review the attached list and inform Mediation Assistant Beatriz Smith by email (Beatriz_Smith@ca9.uscourts.gov) of any corrections to the list. Please notify Circuit Mediator Margaret Corrigan immediately by email (Margaret_Corrigan@ca9.uscourts.gov) if the dispute is settled, the appeal is dismissed or if counsel has an unavoidable scheduling conflict. Please copy all counsel on any such communications. All discussions that take place in the context of the assessment conference are strictly confidential. For more detailed information about the assessment conference, confidentiality, the Mediation Program and its procedures generally, please see the attachment to this order and the

Date Filed	#	Docket Text
		Mediation Program web site: www.ca9.uscourts.gov/mediation. [8666198] (BJB) [Entered: 06/13/2013 10:06 AM]
06/26/2013	6	Filed order MEDIATION (MAC): On June 25, 2013, a telephone conference was held with Circuit Mediator Margaret A. Corrigan. S. Keven Steinberg, Esq. participated on behalf of appellants; Todd Scherwin, Esq. participated on behalf of appellee. The court has determined that this appeal will not be selected for inclusion in the Mediation Program. All further inquiries regarding this appeal, including requests for extensions of time, should be directed to the Clerk's office. Counsel are requested to contact the Circuit Mediator should circumstances develop that warrant further settlement discussions while the appeal is pending. [8682356] (BJB) [Entered: 06/26/2013 12:28 PM]
07/26/2013	7	Filed (ECF) Streamlined request for extension of time to file Opening Brief by Appellants Reuben Castro, Kevin Malone, Hector Navarro and Anthony

Date Filed	#	Docket Text
		Pinkins. New requested due date is 09/04/2013 at 04:00 pm. [8720264] (Steinberg, Keven) [Entered: 07/26/2013 04:51 PM]
07/29/2013	8	Streamlined request by Appellants Reuben Castro, Kevin Malone, Hector Navarro and Anthony Pinkins to extend time to file the brief is approved. Amended briefing schedule: Appellants Reuben Castro, Kevin Malone, Hector Navarro and Anthony Pinkins opening brief due 09/04/2013. Appellee Encino Motorcars, LLC answering brief due 10/04/2013. The optional reply brief is due 14 days from the date of service of the answering brief. [8720830] (LW) [Entered: 07/29/2013 09:59 AM]
07/30/2013	9	Form 13 streamlined request by Appellants Reuben Castro, Kevin Malone, Hector Navarro and Anthony Pinkins to extend time to file the brief is not approved because it is unnecessary. The streamlined request was approved 7/29/13. [8723098] (LW) [Entered: 07/30/2013 12:54 PM]

Date Filed	#	Docket Text
09/03/2013	10	Submitted (ECF) Opening Brief and excerpts of record for review. Submitted by Appellants Reuben Castro, Kevin Malone, Hector Navarro and Anthony Pinkins. Date of service: 09/03/2013. [8766211]-[COURT UPDATE: Attached corrected brief and excerpts. Resent NDA. 09/06/2013 by RY] (Steinberg, Keven) [Entered: 09/03/2013 01:56 PM]
		***
09/16/2013	13	Filed Appellants Reuben Castro, Kevin Malone, Hector Navarro and Anthony Pinkins paper copies of excerpts of record [10] in 1 volume(s). [8788406] (WWP) [Entered: 09/19/2013 06:54 AM]
10/04/2013	14	Submitted (ECF) Answering Brief for review. Submitted by Appellee Encino Motorcars, LLC. Date of service: 10/04/2013. [8809818]-[COURT UPDATE: Attached corrected brief. Resent NDA. 10/08/2013 by RY] (Calvert, Colin) [Entered: 10/04/2013 12:36 PM]
10/09/2013	15	Filed clerk order: The answering brief [14] submitted

Date Filed	#	Docket Text
		by Encino Motorcars, LLC is filed. Within 7 days of the filing of this order, filer is ordered to file 7 copies of the brief in paper format, accompanied by certification, attached to the end of each copy of the brief, that the brief is identical to the version submitted electronically. Cover color: red. The paper copies shall be printed from the PDF version of the brief created from the word processing application, not from PACER or Appellate ECF. [8815176] (WWP) [Entered: 10/09/2013 11:03 AM]
***		
10/18/2013	17	Submitted (ECF) Reply Brief for review. Submitted by Appellants Reuben Castro, Kevin Malone, Hector Navarro and Anthony Pinkins. Date of service: 10/18/2013. [8827819] (Steinberg, Keven) [Entered: 10/18/2013 03:51 PM]
***		
12/01/2014	20	Notice of Oral Argument on Wednesday, February 11, 2015 - 09:00 A.M. - Courtroom 3 - Pasadena, CA.

Date Filed	#	Docket Text
		View the Oral Argument Calendar for your case here. When you have reviewed the calendar, download the ACKNOWLEDGMENT OF HEARING NOTICE form, complete the form, and file it via Appellate ECF or return the completed form to: PASADENA Office. [9331468] (LN) [Entered: 12/01/2014 01:53 PM]
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01/09/2015	26	REVISED:Notice of Oral Argument on Wednesday, February 11, 2015 - 09:30 A.M. - Courtroom 3 - Pasadena CA. View the Oral Argument Calendar for your case here. When you have reviewed the calendar, download the ACKNOWLEDGMENT OF HEARING NOTICE form, complete the form, and file it via Appellate ECF or return the completed form to: PASADENA Office. [9377506] (LN) [Entered: 01/09/2015 04:22 PM]
02/11/2015	27	ARGUED AND SUBMITTED TO SUSAN P. GRABER, KIM MCLANE WARDLAW and JAMES C. MAHAN. [9417806]

Date Filed	#	Docket Text
		(LN) [Entered: 02/11/2015 11:44 AM]
03/24/2015	28	FILED OPINION (SUSAN P. GRABER, KIM MCLANE WARDLAW and JAMES C. MAHAN) Dismissal of claims 3, 5, and 7 AFFIRMED; dismissal of claim 1 and the supplemental state-law claims REVERSED; case REMANDED. Costs on appeal awarded to Plaintiffs. Judge: SPG Authoring, FILED AND ENTERED JUDGMENT. [9468746]-[COURT UPDATE: In response to Appellants' motion to correct filed 11/19/15, the caption of the docket and opinion have been corrected. 11/24/2015 by RY] (MM) [Entered: 03/24/2015 08:33 AM]
03/24/2015	29	Filed (ECF) Appellants Reuben Castro, Kevin Malone, Hector Navarro and Anthony Pinkins Correspondence: Letter brief pursuant to Federal Rules of Appellate Procedure, Rule 28(j). Date of service: 03/24/2015 [9469052] [13-55323] (Steinberg, Keven) [Entered: 03/24/2015 09:59 AM]
03/31/2015	30	Filed (ECF) Appellants Reuben Castro, Kevin Malone, Hector

Date Filed	#	Docket Text
		Navarro and Anthony Pinkins bill of costs (Form 10) in the amount of $118.08 USD. Date of service: 03/31/2015 [9478612] [13-55323] (Steinberg, Keven) [Entered: 03/31/2015 11:43 AM]
		***
04/03/2015	32	Filed (ECF) Appellee Encino Motorcars, LLC Motion to extend time to file petition for rehearing until 05/07/2015. Date of service: 04/03/2015. [9483173] [13-55323]-[COURT UPDATE: Updated docket text to reflect correct ECF filing type. 04/03/2015 by TL] (Calvert, Colin) [Entered: 04/03/2015 10:49 AM]
04/08/2015	33	Filed order (SUSAN P. GRABER, KIM MCLANE WARDLAW and JAMES C. MAHAN): Appellee's unopposed motion for an extension of time to May 7, 2015, to file a petition for rehearing and rehearing en banc is GRANTED. [9488507] (AF) [Entered: 04/08/2015 02:22 PM]
05/07/2015	34	Filed (ECF) Appellee Encino Motorcars, LLC petition for rehearing en banc (from

Date Filed	#	Docket Text
		03/24/2015 opinion). Date of service: 05/07/2015. [9529529] [13-55323] (Calvert, Colin) [Entered: 05/07/2015 03:23 PM]
05/18/2015	35	Submitted (ECF) Amicus brief for review (by government or with consent per FRAP 29(a)). Submitted by Brief of Amici Curiae National Automobile Dealers Assoc. and State Automobile Dealers Assocs. For Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon and Washington State ISO Petition for Rehearing En Banc of Defendants Encino Motorcars. Date of service: 05/18/2015. [9541549] [13-55323] (Reid, Felicia) [Entered: 05/18/2015 03:51 PM]
05/18/2015	36	Entered appearance of Amici Curiae NADA and State Automobile Dealers Associations for Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon and Washington State. [9541728] (LA) [Entered: 05/18/2015 04:47 PM]
		***

Date Filed	#	Docket Text
05/22/2015	39	Filed (ECF) notice of appearance of Wendy McGuire Coats for Appellee Encino Motorcars, LLC. Date of service: 05/22/2015. [9547676] [13-55323]-[COURT UPDATE: Attached corrected notice (case number). 05/22/2015 by RY] (Calvert, Colin) [Entered: 05/22/2015 12:10 PM]
***		
06/01/2015	41	Filed order (SUSAN P. GRABER, KIM MCLANE WARDLAW and JAMES C. MAHAN): Judges Graber and Wardlaw have voted to deny Appellee's petition for rehearing en banc, and Judge Mahan has so recommended. The full court has been advised of the petition for rehearing en banc, and no judge of the court has requested a vote on it. Appellee's petition for rehearing en banc is DENIED. [9556160] (AF) [Entered: 06/01/2015 09:50 AM]
06/10/2015	42	MANDATE ISSUED.(SPG, KMW and JCM) Costs taxed against Appellee in the amount of $118.08. [9568325] (Walker,

Date Filed	#	Docket Text
		Synitha) [Entered: 06/10/2015 08:22 AM]
08/24/2015	43	Received letter from the Supreme Court dated 08/20/2015 regarding the application for an ext of time within which to file a petition for a writ of cert...extended the time to and including 9/30/15. Application No: 15A210. [9659461] (RR) [Entered: 08/25/2015 11:31 AM]
10/07/2015	44	Received notice from the Supreme Court: petition for certiorari filed on 09/30/2015. Supreme Court Number 15-415. [9710170] (RR) [Entered: 10/07/2015 12:56 PM]
11/19/2015	45	Filed (ECF) Appellants Reuben Castro, Kevin Malone, Hector Navarro and Anthony Pinkins Motion for miscellaneous relief [Motion to Correct Caption]. Date of service: 11/19/2015. [9763631] [13-55323] (Steinberg, Keven) [Entered: 11/19/2015 04:05 PM]
11/24/2015	46	Entered appearance of Appellant Mike Shirinian. [9769557] (HH) [Entered: 11/24/2015 02:32 PM]

Date Filed	#	Docket Text
01/20/2016	47	Received notice from the Supreme Court. Petition for certiorari GRANTED on 01/15/2016. Supreme Court Number 15-415. [9834029] (RR) [Entered: 01/20/2016 03:38 PM]
06/21/2016	48	Received copy of Supreme Court opinion dated 06/20/2016. The judgment or mandate of this Court will not issue for at least twenty-five days pursuant to Rule 45. Should a petition for rehearing be filed timely, the judgment or mandate will be further stayed pending this Court's action on the petition for rehearing. No. 15-415. [10022497] (RR) [Entered: 06/21/2016 09:38 AM]
	***	
06/24/2016	50	Filed (ECF) Appellee Encino Motorcars, LLC Motion to file supplemental brief, Motion for miscellaneous relief [motion for oral argument]. Date of service: 06/24/2016. [10030552] - [COURT ENTERED FILING to correct entry [49].] (TYL) [Entered: 06/27/2016 02:52 PM]

Date Filed	#	Docket Text
07/22/2016	73	**Supreme Court Case Info** Case number: 15-415 Filed on: 09/30/2015 Cert Petition Action 1: Granted, 01/15/2016 Ruling: Vacated/Remanded, 06/20/2016 Judgment Date: 07/22/2016 [10414560] (ASW) [Entered: 04/28/2017 08:40 AM]
07/25/2016	51	Filed order (SUSAN P. GRABER, KIM MCLANE WARDLAW and JAMES C. MAHAN): Appellee's Motion for Rehearing, Additional Briefing, and Oral Argument Following Supreme Court Vacature [*sic*] and Remand is GRANTED in part. The parties shall file simultaneous briefs not to exceed 7,000 words within 21 days of the filing date of this order; and the parties, within 14 days thereafter, shall file simultaneous responses not to exceed 3,500 words. The Department of Labor is invited to file a brief as amicus curiae, not to exceed 10,000 words, within 35 days of the filing date of this order. Fed. R. App. P. 29(a). Oral argument, if any,

Date Filed	#	Docket Text
		will be determined after briefing is completed. [10061568] (AF) [Entered: 07/25/2016 01:13 PM]
07/25/2016	52	A copy of 7/25/2016 order [51] was served on Edward Dean Sieger at Dept of Labor, via ECF. [10061572] (AF) [Entered: 07/25/2016 01:16 PM]
07/27/2016	53	Received certified copy of Supreme Court 6/20/16 judgment.ON [*sic*] WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit. THIS CAUSE came on to be heard on the transcript of the record from the above court and was argued by counsel. ON CONSIDERATION WHEREOF, it is ordered and adjudged by this Court that the judgment of the above court is vacated with costs, and the case is remanded to the United States Court of Appeals for the Ninth Circuit for further proceedings consistent with the opinion of this Court. IT IS FURTHER ORDERED that the petitioner Encino Motorcars, LLC recover from Hector Navarro, et al. One Thousand Two Hundred and Fifty-nine

Date Filed	#	Docket Text
		Dollars and Thirteen cents ($1,259.13) for costs herein expended. Supreme Court case number: 15-415. [10064952] (RR) [Entered: 07/27/2016 10:37 AM]
08/15/2016	54	Submitted (ECF) Supplemental Brief for review. Submitted by Appellee Encino Motorcars, LLC. Date of service: 08/15/2016. [10087231] [13-55323] - [COURT UPDATE: Attached corrected PDF. 08/16/2016 by LA] (Coats, Wendy) [Entered: 08/15/2016 01:47 PM]
08/15/2016	55	Submitted (ECF) Supplemental Brief for review. Submitted by Appellants Reuben Castro, Kevin Malone, Hector Navarro, Anthony Pinkins and Mike Shirinian. Date of service: 08/15/2016. [10087895] [13-55323] (Steinberg, Keven) [Entered: 08/15/2016 07:30 PM]
08/16/2016	56	Filed clerk order: The supplemental brief [54] submitted by Encino Motorcars, LLC is filed. Within 7 days of the filing of this order, filer is ordered to file 7 copies of the brief in paper format,

Date Filed	#	Docket Text
		accompanied by certification, attached to the end of each copy of the brief, that the brief is identical to the version submitted electronically. Cover color: tan. The paper copies shall be printed from the PDF version of the brief created from the word processing application, not from PACER or Appellate CM/ECF. [10088350] (LA) [Entered: 08/16/2016 10:38 AM]
08/16/2016	57	Filed clerk order: The supplemental brief [55] submitted by appellants is filed. Within 7 days of the filing of this order, filer is ordered to file 7 copies of the brief in paper format, accompanied by certification, attached to the end of each copy of the brief, that the brief is identical to the version submitted electronically. Cover color: tan. The paper copies shall be printed from the PDF version of the brief created from the word processing application, not from PACER or Appellate CM/ECF. [10088371] (LA) [Entered: 08/16/2016 10:43 AM]
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Date Filed	#	Docket Text
08/29/2016	60	Submitted (ECF) Supplemental Brief for review. Submitted by Appellants Hector Navarro, Mike Shirinian, Anthony Pinkins, Kevin Malone and Reuben Castro. Date of service: 08/29/2016. [10104507] [13-55323] (Steinberg, Keven) [Entered: 08/29/2016 12:14 PM]
8/29/2016	61	Submitted (ECF) Amicus brief for review (by government or with consent per FRAP 29(a)). Submitted by U.S. Department of Labor. Date of service: 08/29/2016. [10104534] [13-55323] (Murphy, Melissa) [Entered: 08/29/2016 12:28 PM]
8/29/2016	62	Filed clerk order: The supplemental brief [60] submitted by appellants is filed. Within 7 days of the filing of this order, filer is ordered to file 7 copies of the brief in paper format, accompanied by certification, attached to the end of each copy of the brief, that the brief is identical to the version submitted electronically. Cover color: tan. The paper copies shall be printed from the PDF version of the brief created from the word processing application,

Date Filed	#	Docket Text
		not from PACER or Appellate CM/ECF. [10105319] (KT) [Entered: 08/29/2016 04:10 PM]
08/29/2016	63	Submitted (ECF) Supplemental Brief for review. Submitted by Appellee Encino Motorcars, LLC. Date of service: 08/29/2016. [10105336] [13-55323] (Coats, Wendy) [Entered: 08/29/2016 04:16 PM]
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08/29/2016	65	Filed clerk order: The amicus brief [61] submitted by Secretary of Labor is filed. Within 7 days of the filing of this order, filer is ordered to file 7 copies of the brief in paper format, accompanied by certification, attached to the end of each copy of the brief, that the brief is identical to the version submitted electronically. Cover color: green. The paper copies shall be printed from the PDF version of the brief created from the word processing application, not from PACER or Appellate CM/ECF. [10105346] (KT) [Entered: 08/29/2016 04:18 PM]
08/29/2016	66	Filed clerk order: The supplemental brief [63]

Date Filed	#	Docket Text
		submitted by Encino Motorcars, LLC is filed. Within 7 days of the filing of this order, filer is ordered to file 7 copies of the brief in paper format, accompanied by certification, attached to the end of each copy of the brief, that the brief is identical to the version submitted electronically. Cover color: tan. The paper copies shall be printed from the PDF version of the brief created from the word processing application, not from PACER or Appellate CM/ECF. [10105361] (KT) [Entered: 08/29/2016 04:24 PM]
		***
01/09/2017	70	FILED OPINION (SUSAN P. GRABER, KIM MCLANE WARDLAW and JAMES C. MAHAN) AFFIRMED in part, REVERSED in part, and REMANDED. Costs on appeal awarded to Plaintiffs-Appellants. Judge: SPG Authoring, Judge: KMW , Judge: JCM . FILED AND ENTERED JUDGMENT. [10258345] (PH) [Entered: 01/09/2017 08:43 AM]

Date Filed	#	Docket Text
01/31/2017	71	MANDATE ISSUED.(SPG, KMW and JCM) [10291607] (Walker, Synitha) [Entered: 01/31/2017 10:11 AM]
04/07/2017	72	Received letter from the Supreme Court dated 04/03/2017 regarding The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice Kennedy, who on April 3, 2017, extended the time to and including May 10, 2017. Application No. 16A9. [10394188] (RR) [Entered: 04/12/2017 07:58 PM]
05/15/2017	74	**Supreme Court Case Info** Case number: 16-1362 Filed on: 05/10/2017 Cert Petition Action 1: Pending [10434282] (HH) [Entered: 05/15/2017 12:49 PM]
09/29/2017	75	**Supreme Court Case Info** Case number: 16-1362 Filed on: 05/10/2017 Cert Petition Action 1: Granted, 09/28/2017 [10600132] (RR) [Entered: 09/29/2017 02:37 PM]

UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA WESTERN DIVISION - LOS ANGELES

No. 2:12-cv-08051-RGK-MRW

HECTOR NAVARRO et al,

v.

MERCEDES BENZ OF ENCINO,

DOCKET ENTRIES

Date Filed	#	Docket Text
09/18/2012	1	COMPLAINT against Defendant Mercedes Benz of Encino. Case assigned to Judge R. Gary Klausner for all further proceedings. Discovery referred to Magistrate Judge Michael R Wilner. (Filing fee $ 350 PAID.) Jury Demanded., filed by Plaintiffs Mike Shirinian, Hector Navarro, Anthony Pinkins, Kevin Malone, Reuben Castro.(et) (mg). (Entered: 09/24/2012)
09/18/2012		21 DAY Summons Issued re Complaint - (Discovery) 1 as to Defendant Mercedes Benz of Encino. (et) (Entered: 09/24/2012)

Date Filed	#	Docket Text
09/18/2012	2	CERTIFICATION AND NOTICE of Interested Parties filed by Plaintiffs Reuben Castro, Kevin Malone, Hector Navarro, Anthony Pinkins, Mike Shirinian. (et) (mg). (Entered: 09/24/2012)
09/24/2012	3	STANDING ORDER by Judge R. Gary Klausner. (rne) (Entered: 09/25/2012)
		***
11/15/2012	5	[DOCUMENT STRICKEN] - NOTICE OF MOTION AND MOTION to Dismiss Case *For Failure to State a Claim Upon Which Relief Can Be Granted FRCP 12(b)(6)* filed by Defendant Mercedes Benz of Encino. Motion set for hearing on 12/17/2012 at 09:00 AM before Judge R. Gary Klausner. (Attachments: # 1 Memorandum, # 2 Declaration of Colin P. Calvert with Exhibit A, # 3 Notice of Lodgment, # 4 Exhibit A-D to Lodgment, # 5 Exhibit E-K to Lodgment, # 6 Proposed Order)(Calvert, Colin) Modified on 11/16/2012 (rne). (Entered: 11/15/2012)
11/15/2012	6	REQUEST FOR JUDICIAL NOTICE re MOTION to

Date Filed	#	Docket Text
		Dismiss Case *For Failure to State a Claim Upon Which Relief Can Be Granted FRCP 12(b)(6)* MOTION to Dismiss Case *For Failure to State a Claim Upon Which Relief Can Be Granted FRCP 12(b)(6)* 5 filed by Defendant Mercedes Benz of Encino. (Calvert, Colin) (Entered: 11/15/2012)
11/16/2012	7	ORDER TO STRIKE ELECTRONICALLY FILED DOCUMENTS by Judge R. Gary Klausner: the following document(s) be STRICKEN for failure to comply with the Local Rules, General Order and/or the Courts Case Management Order: MOTION to Dismiss Case *For Failure to State a Claim Upon Which Relief Can Be Granted FRCP 12(b)(6)* MOTION to Dismiss Case *For Failure to State a Claim Upon Which Relief Can Be Granted FRCP 12(b)(6)* 5 , for the following reasons: Local Rule 7.1-1 No Certification of Interested Parties and/or no copies. (rne) (Entered: 11/16/2012)

Date Filed	#	Docket Text
11/16/2012	8	of Interested Parties filed by Defendant Mercedes Benz of Encino, (Calvert, Colin) (Entered: 11/16/2012)
11/16/2012	9	NOTICE OF MOTION AND MOTION to Dismiss Case *For Failure to State A Claim Upon Which Relief Can Be Granted FRCP 12(b)(6)* filed by Defendant Mercedes Benz of Encino. Motion set for hearing on 12/17/2012 at 09:00 AM before Judge R. Gary Klausner. (Attachments: # 1 Memorandum of Points and Authorities, # 2 Declaration of Colin P. Calvert with Exhibit A, # 3 Notice of Lodgment, # 4 Exhibit A-D to Lodgment, # 5 Exhibit E-K to Lodgment, # 6 Proposed Order)(Calvert, Colin) (Entered: 11/16/2012)
11/16/2012	10	REQUEST FOR JUDICIAL NOTICE re MOTION to Dismiss Case *For Failure to State A Claim Upon Which Relief Can Be Granted FRCP 12(b)(6)* MOTION to Dismiss Case *For Failure to State A Claim Upon Which Relief Can Be Granted FRCP 12(b)(6)* 9 filed by Defendant Mercedes

Date Filed	#	Docket Text
		Benz of Encino. (Calvert, Colin) (Entered: 11/16/2012)
11/19/2012	11	NOTICE of Related Case(s) filed by Defendant Mercedes Benz of Encino. Related Case(s): None (Calvert, Colin) (Entered: 11/19/2012)
11/19/2012	12	MINUTES: (IN CHAMBERS) NOTICE TO ALL PARTIES AND ORDER: On the Court's own motion, defendant Mercedes Benz of Encino's Motion to Dismiss Case 9 , filed on November 16, 2012 and noticed for hearing on December 17, 2012 at 9:00 a.m., is hereby CONTINUED TO January 7, 2013 at 9:00 a.m. IT IS SO ORDERED by Judge R. Gary Klausner. (ir) (Entered: 11/19/2012)
12/12/2012	13	NOTICE OF MOTION AND MOTION for Sanctions Federal Rules of Civil Procedure Rule 11 and Local Rule 11-9 filed by Plaintiffs Reuben Castro, Kevin Malone, Hector Navarro, Anthony Pinkins, Mike Shirinian. Motion set for hearing on 1/14/2013 at 09:00 AM before Judge R. Gary Klausner. (Attachments:

Date Filed	#	Docket Text
		# 1 Proposed Order Re Motion for Sanctions in the Amount of $19,175.00 Pursuant to Federal Rules of Civil Procedure Rule 11 and Local Rule 11-9)(Steinberg, S) (Entered: 12/12/2012)
12/17/2012	14	to Motion to Dismiss for Failure to State a Claim Upon Which Relief Can be Granted (FRCP 12(B)(6); Memorandum of Points and Authorities; Declaration of S. Keven Steinberg; Exhibits Opposition re: MOTION to Dismiss Case *For Failure to State A Claim Upon Which Relief Can Be Granted FRCP 12(b)(6)* MOTION to Dismiss Case *For Failure to State A Claim Upon Which Relief Can Be Granted FRCP 12(b)(6)* 9 *Plaintiff's Opposition to Motion* filed by Plaintiffs Reuben Castro, Kevin Malone, Hector Navarro, Anthony Pinkins, Mike Shirinian. (Steinberg, S) (Entered: 12/17/2012)
12/17/2012	15	REQUEST FOR JUDICIAL NOTICE re MOTION to Dismiss Case *For Failure to State A Claim Upon Which Relief Can Be Granted FRCP*

Date Filed	#	Docket Text
		12(b)(6) MOTION to Dismiss Case *For Failure to State A Claim Upon Which Relief Can Be Granted FRCP 12(b)(6)* 9 *"Request for Judicial Notice in Support of Plaintiffs' Opposition to Motion to Dismiss for Failure to State a Claim Upon Which Relief Can be Granted (FRCP 12(B)(6)); Exhibit"* filed by Plaintiffs Reuben Castro, Kevin Malone, Hector Navarro, Anthony Pinkins, Mike Shirinian. (Steinberg, S) (Entered: 12/17/2012)
12/21/2012	16	OPPOSITION in opposition re: MOTION for Sanctions Federal Rules of Civil Procedure Rule 11 and Local Rule 11-9 13 filed by Defendant Mercedes Benz of Encino. (Attachments: # 1 Declaration Colin P. Calvert in support, # 2 Declaration Todd B. Scherwin in support)(Calvert, Colin) (Entered: 12/21/2012)
12/21/2012	17	OPPOSITION in opposition re: MOTION to Dismiss Case *For Failure to State A Claim Upon Which Relief Can Be Granted FRCP 12(b)(6)* MOTION to Dismiss Case *For Failure to State A Claim Upon Which*

Date Filed	#	Docket Text
		Relief Can Be Granted FRCP 12(b)(6) 9 filed by Defendant Mercedes Benz of Encino. (Calvert, Colin) (Entered: 12/21/2012)
12/21/2012	18	NOTICE OF ERRATA filed by Defendant Mercedes Benz of Encino. correcting Objection/Opposition (Motion related), Objection/Opposition (Motion related) 17 (Calvert, Colin) (Entered: 12/21/2012)
12/21/2012	19	REPLY in support MOTION to Dismiss Case *For Failure to State A Claim Upon Which Relief Can Be Granted FRCP 12(b)(6)* MOTION to Dismiss Case *For Failure to State A Claim Upon Which Relief Can Be Granted FRCP 12(b)(6)* 9 filed by Defendant Mercedes Benz of Encino. (Calvert, Colin) (Entered: 12/21/2012)
12/31/2012	20	REPLY Reply [*sic*] to Opposition to Motion for Sanctions MOTION for Sanctions Federal Rules of Civil Procedure Rule 11 and Local Rule 11-9 13 *; Memorandum of Points and Authorities; Declaration of S. Keven Steinberg; Exhibit* filed by Plaintiffs Reuben Castro, Kevin

Date Filed	#	Docket Text
		Malone, Hector Navarro, Anthony Pinkins, Mike Shirinian. (Steinberg, S) (Entered: 12/31/2012)
12/31/2012	21	REQUEST FOR JUDICIAL NOTICE *in Support of Plaintiffs' Reply to Opposition to Motion for Sanctions in the Amount of $19,175.00 Pursuant to Federal Rules of Civil Procedure Rule 11 and Local Rule 11-9* filed by Plaintiffs Reuben Castro, Kevin Malone, Hector Navarro, Anthony Pinkins, Mike Shirinian. (Steinberg, S) (Entered: 12/31/2012)
01/02/2013	22	(IN CHAMBERS) NOTICE TO ALL PARTIES AND ORDER by Judge R. Gary Klausner. Defendants Motion to Dismiss Case For Failure to State A Claim Upon Which Relief Can Be Granted FRCP 12(b)(6) (DE 9), noticed for hearing on January 7, 2013, has been taken under submission and off the motion calendar. No appearances by counsel are necessary. The Court will issue a ruling after full consideration of properly submitted pleadings.

Date Filed	#	Docket Text
		THERE IS NO PDF DOCUMENT ASSOCIATED WITH THIS ENTRY.(sw) TEXT ONLY ENTRY (Entered: 01/02/2013)
01/03/2013	23	ORDER SETTING SCHEDULING CONFERENCE by Judge R. Gary Klausner. Rule 26 Meeting Report due by 3/4/2013. Scheduling Conference set for 3/11/2013 09:00 AM before Judge R. Gary Klausner. (rne) (Entered: 01/03/2013)
01/09/2013	24	MINUTE ORDER IN CHAMBERS by Judge R. Gary Klausner: re: MOTION for Sanctions Federal Rules of Civil Procedure Rule 11 and Local Rule 11-9 13 . The above-referenced motion, noticed for hearing on January 14, 2013, has been taken under submission and off the motion calendar. No appearances by counsel are necessary. (rne) (Entered: 01/09/2013)
01/25/2013	25	MINUTES: (IN CHAMBERS) Order Re: Defendant's Motion to Dismiss 9 The Court GRANTS Defendant's Motion to Dismiss as to Plaintiffs' First, Third,

Date Filed	#	Docket Text
		Fifth, and Seventh claims. The Court sua sponte DISMISSES the remaining state law causes of action. As such, Plaintiffs' Complaint is dismissed in its entirety IT IS SO ORDERED by Judge R. Gary Klausner. (MD JS-6. Case Terminated) (ir) (Entered: 01/25/2013)
02/14/2013	26	MINUTES: (IN CHAMBERS) Order Re: Plaintiff's Motion for Sanctions Pursuant to FRCP 11 13 is DENIED IT IS SO ORDERED by Judge R. Gary Klausner. (ir) (Entered: 02/14/2013)
02/22/2013	27	NOTICE Notice [*sic*] of Appeal-Plaintiffs' Notice of Appeal to the United States Court of Appeal for the Ninth Circuit of Order Re: Motion to Dismiss for Failure to State a Claim Upon Which Relief Can be Granted (FRCP 12(B)(6) Representation Statement filed by Plaintiffs and Appellants Reuben Castro, Kevin Malone, Hector Navarro, Anthony Pinkins, Mike Shirinian. (Steinberg, S) (Entered: 02/22/2013)
02/25/2013	28	NOTICE OF ERRATA filed by Plaintiffs Reuben Castro, Kevin

Date Filed	#	Docket Text
		Malone, Hector Navarro, Anthony Pinkins, Mike Shirinian. correcting Notice (Other), 27 *RE Notice of Appeal - Plaintiffs' Notice of Appeal to the United States Court of Appeal For the Ninth Circuit of Order Re: Motion to Dismiss For Failure to State a Claim Upon Which Relief Can be Granted (FRCP 12(B)(6))* (Steinberg, S) (Entered: 02/25/2013)
02/25/2013	29	NOTICE OF APPEAL to the 9th CCA filed by Plaintiffs Reuben Castro, Kevin Malone, Hector Navarro, Anthony Pinkins, Mike Shirinian. Appeal of Order on Motion to Dismiss Case, 25 (Appeal fee of $455 receipt number 0973-11715457 paid.) (Steinberg, S) (Entered: 02/25/2013)
02/26/2013	30	NOTIFICATION by Circuit Court of Appellate Docket Number 13-55323, 9th CCA regarding Notice of Appeal to 9th Circuit Court of Appeals, 29 as to Plaintiffs Reuben Castro, Kevin Malone, Hector Navarro, Anthony Pinkins, Mike Shirinian. (car) (Entered: 03/01/2013)

Date Filed	#	Docket Text
03/24/2015	31	OPINION from Ninth Circuit Court of Appeals filed re: Notice of Appeal to 9th Circuit Court of Appeals, 29 filed by Mike Shirinian, Kevin Malone, Anthony Pinkins, Reuben Castro, Hector Navarro. CCA # 13-55323. Dismissal of claims 3, 5, and 7 AFFIRMED; dismissal of claim 1 and the supplemental state-law claims REVERSED; case REMANDED. Costs on appeal awarded to Plaintiffs. [See document for all details] (mat) (Main Document 31 replaced on 11/25/2015) (mat).[Per 9th CCA][The opinion has been corrected. 11/24/2015 Modified on 11/25/2015 (mat). (Entered: 03/26/2015)
04/08/2015	32	ORDER from Ninth Circuit Court of Appeals filed re: Notice of Appeal to 9th Circuit Court of Appeals, 29 filed by Mike Shirinian, Kevin Malone, Anthony Pinkins, Reuben Castro, Hector Navarro. CCA # 13-55323. Appellee's unopposed motion for an extension of time to May 7, 2015, to file a petition for rehearing and rehearing en

Date Filed	#	Docket Text
		banc is GRANTED. (car) (Entered: 04/09/2015)
06/01/2015	33	ORDER from Ninth Circuit Court of Appeals filed re: Notice of Appeal to 9th Circuit Court of Appeals, 29 filed by Mike Shirinian, Kevin Malone, Anthony Pinkins, Reuben Castro, Hector Navarro. CCA # 13-55323. Appellee's petition for rehearing en banc is DENIED. (mat) (Entered: 06/03/2015)
06/10/2015	34	MANDATE of Ninth Circuit Court of Appeals filed re: Notice of Appeal 29 CCA # 13-55323. The judgment of the 9th Circuit Court, entered March 24, 2015, takes effect this date.This constitutes the formal mandate of the 9th CCA issued pursuant to Rule 41(a) of the Federal Rules of Appellate Procedure.Costs are taxed against the appellee in the amount of $118.08. [See USCA OPINION 31 AFFIRMED, REVERSED AND REMANDED] (mat) (Entered: 06/12/2015)
06/18/2015	35	SCHEDULING NOTICE TO ALL PARTIES AND ORDER by Judge R. Gary Klausner. A scheduling conference has been

Date Filed	#	Docket Text
		placed on calendar for September 21, 2015 at 9:00 a.m. The Conference will be held pursuant to F.R.Civ. P. 16(b). Trial counsel must be present and there are no telephonic appearances. Counsel are ordered to file a joint statement providing a brief factual summary of the case, including the claims being asserted. The parties are reminded of their obligations to disclose information and confer on a discovery plan not later than 21 days prior to the scheduling conference, and to file a joint statement with the Court not later than 14 days after they confer, as required by F.R. Civ.P. 26 and the Local Rules of this Court. Failure to comply may lead to the imposition of sanctions. Plaintiffs counsel is directed to give notice of the scheduling conference to each party that makes an initial appearance in the action after this date. Not later than 5 court days prior to the Scheduling Conference, counsel are ordered to confer and electronically file (joint) Form ADR-1 (and

Date Filed	#	Docket Text
		proposed order, Form ADR 12), selecting one of the three settlement options available.THERE IS NO PDF DOCUMENT ASSOCIATED WITH THIS ENTRY. (pso) TEXT ONLY ENTRY (Entered: 06/18/2015)
09/01/2015	36	STIPULATION to Continue Scheduling Conference from September 21, 2015 to January 19, 2016 filed by defendant Mercedes Benz of Encino. (Attachments: # 1 Proposed Order Order [*sic*] Granting Joint Stipulation Requesting a Continuance of Scheduling Conference)(Calvert, Colin) (Entered: 09/01/2015)
09/02/2015	37	ORDER GRANTING STIPULATION JOINT STIPULATION REQUESTING A CONTINUANCE OF SCHEDULING CONFERENCE 36 by Judge R. Gary Klausner. Pursuant to the stipulation of the parties, and good cause appearing, Scheduling Conference currently scheduled for September 21, 2015 has been continued to December 14, 2015

Date Filed	#	Docket Text
		at 9:00 a.m. (lom) (Entered: 09/02/2015)
11/06/2015	38	REQUEST TO SUBSTITUTE ATTORNEY Keven Steinberg in place of attorney Keith Fink, Sara Hernandez and Keven Steinberg of Fink & Steinberg filed by PLAINTIFF Hector Navarro. (Steinberg, Keven) (Entered: 11/06/2015)
11/06/2015	39	REQUEST TO SUBSTITUTE ATTORNEY Keven Steinberg in place of attorney Keith Fink, Sarah Hernandez and Keven Steinberg of Fink & Steinberg filed by PLAINTIFF Mike Shirinian. (Steinberg, Keven) (Entered: 11/06/2015)
11/06/2015	40	REQUEST TO SUBSTITUTE ATTORNEY Keven Steinberg in place of attorney Keith Fink, Sarah Hernandez and Keven Steinberg of Fink & Steinberg filed by Plaintiff Anthony Pinkins. (Steinberg, Keven) (Entered: 11/06/2015)
11/06/2015	41	REQUEST TO SUBSTITUTE ATTORNEY Keven Steinberg in place of attorney Keith Fink, Sarah Hernandez and Keven Steinberg of Fink & Steinberg filed by Plaintiff Kevin Malone.

Date Filed	#	Docket Text
		(Steinberg, Keven) (Entered: 11/06/2015)
11/06/2015	42	REQUEST TO SUBSTITUTE ATTORNEY Keven Steinberg in place of attorney Keith Fink, Sarah Hernandez and Keven Steinberg of Fink & Steinberg filed by Plaintiff Reuben Castro. (Steinberg, Keven) (Entered: 11/06/2015)
11/09/2015	44	ORDER ON REQUEST FOR APPROVAL OF SUBSTITUTION OF ATTORNEY by Judge R. Gary Klausner: The Court hereby orders that the request of: Hector Navarro, Plaintiff to substitute Keven Steinberg as attorney of record instead of Keith Fink, Sarah Hernandez and Keven Steinberg of Fink & Steinberg, 38 (bp) Modified on 11/13/2015 (bp). (Entered: 11/13/2015)
11/09/2015	45	ORDER ON REQUEST FOR APPROVAL OF SUBSTITUTION OF ATTORNEY by Judge R. Gary Klausner: The Court hereby orders that the request of: Kevin Malone, Plaintiff to substitute Keven Steinberg as attorney of

Date Filed	#	Docket Text
		record instead of Keith Fink, Sarah Hernandez and Kevin Steinberg of Fink & Steinberg, 41 (bp) (Entered: 11/13/2015)
11/09/2015	46	ORDER ON REQUEST FOR APPROVAL OF SUBSTITUTION OF ATTORNEY by Judge R. Gary Klausner: The Court hereby orders that the request of: Anthony Pinkins, Plaintiff to substitute Keven Steinberg as attorney of record instead of Keith Fink, Sarah Hernandez and Keven Steinberg of Fink & Steinberg, 40 (bp) (Entered: 11/13/2015)
11/09/2015	47	ORDER ON REQUEST FOR APPROVAL OF SUBSTITUTION OF ATTORNEY by Judge R. Gary Klausner: The Court hereby orders that the request of: Mike Shirinian, Plaintiff to substitute Keven Steinberg as attorney of record instead of Keith Fink, Sarah Hernandez and Keven Steinberg of Fink & Steinberg, 39 (bp) (Entered: 11/13/2015)
11/09/2015	48	ORDER ON REQUEST FOR APPROVAL OF SUBSTITUTION OF

Date Filed	#	Docket Text
		ATTOERNEY by Judge R. Gary Klausner: The Court hereby orders that the request of: Reuben Castro, Plaintiff to substitute Keven Steinberg as attorney of record instead of Keith Frank, Sarah Hernandez and Keven Steinberg of Fink & Steinberg, 42 (bp) (Entered: 11/13/2015)
11/10/2015	43	NOTICE TO FILER OF DEFICIENCIES in Electronically Filed Documents RE: REQUEST TO SUBSTITUTE ATTORNEY Keven Steinberg in place of attorney Keith Fink, Sarah Hernandez and Keven Steinberg of Fink & Steinberg 42 , REQUEST TO SUBSTITUTE ATTORNEY Keven Steinberg in place of attorney Keith Fink, Sarah Hernandez and Keven Steinberg of Fink & Steinberg 39 , REQUEST TO SUBSTITUTE ATTORNEY Keven Steinberg in place of attorney Keith Fink, Sarah Hernandez and Keven Steinberg of Fink & Steinberg 41 , REQUEST TO SUBSTITUTE ATTORNEY

Date Filed	#	Docket Text
		Keven Steinberg in place of attorney Keith Fink, Sara Hernandez and Keven Steinberg of Fink & Steinberg 38 , REQUEST TO SUBSTITUTE ATTORNEY Keven Steinberg in place of attorney Keith Fink, Sarah Hernandez and Keven Steinberg of Fink & Steinberg 40 . The following error(s) was found: Other error(s) with document(s) are specified below: G-01 Request for Approval of Substitution of Attorney or Withdrawal of Counsel not submitted.. [*sic*] In response to this notice the court may order (1) an amended or correct document to be filed (2) the document stricken or (3) take other action as the court deems appropriate. You need not take any action in response to this notice unless and until the court directs you to do so. (bp) (Entered: 11/10/2015)
11/19/2015	49	STIPULATION to Continue Scheduling Conference from 12/14/15 to April 13, 2016 (120 days) filed by defendant Mercedes Benz of Encino. (Attachments: # 1 Proposed

Date Filed	#	Docket Text
		Order Granting Joint Stipulation Requesting A Continuance of Scheduling Conference)(Calvert, Colin) (Entered: 11/19/2015)
11/20/2015	50	ORDER GRANTING JOINT STIPULATION REQUESTING A CONTINUANCE OF SCHEDULING CONFERENCE TO 2/22/2016 at 09:00 AM 49 by Judge R. Gary Klausner (lc) (Entered: 11/20/2015)
07/25/2016	51	ORDER from Ninth Circuit Court of Appeals filed re: Notice of Appeal to 9th Circuit Court of Appeals, 29 filed by Mike Shirinian, Kevin Malone, Anthony Pinkins, Reuben Castro, Hector Navarro. CCA # 13-55323. Appellee's Motion for Rehearing, Additional Briefing, and Oral Argument Following Supreme Court Vacature [*sic*] and Remand is GRANTED in part. [See document for further information] (car) (Entered: 07/27/2016)
01/09/2017	52	OPINION from Ninth Circuit Court of Appeals filed re: Notice of Appeal to 9th Circuit Court of Appeals, 29 filed by Mike Shirinian, Kevin Malone,

Date Filed	#	Docket Text
		Anthony Pinkins, Reuben Castro, Hector Navarro. CCA # 13-55323. AFFIRMED in part, REVERSED in part, andREMANDED [*sic*]. Costs on appeal awarded to Plaintiffs-Appellants.(mat) (Entered: 01/09/2017)
01/31/2017	53	MANDATE of Ninth Circuit Court of Appeals filed re: USCA Memorandum/Opinion/Order, 52 , Notice of Appeal to 9th Circuit Court of Appeals, 29 , CCA # 13-55323. The judgment of this Court, entered January 09, 2017, takes effect this date. This constitutes the formal mandate of this Court issued pursuant to Rule 41(a) of the Federal Rules of Appellate Procedure. (car) (Entered: 01/31/2017)
02/08/2017	54	MINUTE ORDER IN CHAMBERS by Judge R. Gary Klausner: This Court is in receipt of the Mandate issued by the Ninth Circuit Court of Appeals on January 31, 2017 53 . Defendant shall file an answer within 20 days of the date of this order. A Scheduling Conference has been placed on

Date Filed	#	Docket Text
		calendar for May 1, 2017 at 9:00 a.m. The Conference will be held pursuant to F.R.Civ.P.16(b). Trial counsel must be present and there are no telephonic appearances. Counsel are ordered to file a joint statement providing a brief factual summary of the case, including the claims being asserted. The parties are reminded of their obligations to disclose information and confer on a discovery plan not later than 21 days prior to the scheduling conference, and to file a joint statement with the Court not later than 14 days after they confer, as required by F.R.Civ.P 26 and the Local Rules of this Court. Failure to comply may lead to the imposition of sanctions. Plaintiff's counsel is directed to give notice of the scheduling conference to each party that makes an initial appearance in the action after this date. (bp) (Entered: 02/08/2017)
02/27/2017	55	STIPULATION to Stay Case filed by defendant Mercedes Benz of Encino. (Attachments: # 1 Proposed Order re Joint

Date Filed	#	Docket Text
		Stipulation to Stay Proceedings)(Calvert, Colin) (Entered: 02/27/2017)
02/28/2017	56	ANSWER to Complaint - (Discovery), 1 filed by Defendant Mercedes Benz of Encino.(Calvert, Colin) (Entered: 02/28/2017)
03/03/2017	57	DENYING STIPULATION AND ORDER by Judge R. Gary Klausner: re Stipulation to Stay Case 55 . (ah) (Entered: 03/06/2017)
04/17/2017	58	JOINT REPORT Rule 26(f) Discovery Plan *Report* ; estimated length of trial 3 weeks, filed by Defendant Mercedes Benz of Encino.. (Scherwin, Todd) (Entered: 04/17/2017)
05/01/2017	59	ORDER/REFERRAL to ADR Procedure No. 3 by Judge R. Gary Klausner. Case ordered to a private mediator based upon court order. (sw) (Entered: 05/01/2017)
05/01/2017	60	ORDER RE JURY TRIAL by Judge R. Gary Klausner. Pretrial Conference set for 1/2/2018 at 9:00 am; Jury Trial set for 1/16/2018 at 9:00 am. See

Date Filed	#	Docket Text
		Order for details. (sw) (Entered: 05/01/2017)
05/01/2017	61	MINUTES OF Scheduling Conference held before Judge R. Gary Klausner. Amended Pleadings due by 6/15/2017. Discovery cut-off 10/19/2017. Motions due by 11/2/2017. Pretrial Conference set for 1/2/2018 at 9:00 am. Jury Trial set for 1/16/2018 at 9:00 am. Court Reporter: Sandra MacNeil. (sw) (Entered: 05/01/2017)
07/19/2017	62	Joint STIPULATION to Continue Trial from January 16, 2018 to April 16, 2018 filed by DEFENDANT Mercedes Benz of Encino. (Attachments: # 1 Declaration of Todd B. Scherwin ISO Joint Stipulation to Continue Trial, # 2 Proposed Order on Joint Stipulation to Continue Trial)(Attorney Todd B Scherwin added to party Mercedes Benz of Encino(pty:dft))(Scherwin, Todd) (Entered: 07/19/2017)
08/02/2017	63	DENYING STIPULATION AND ORDER 62 by Judge R. Gary Klausner. (ah) (Entered: 08/02/2017)

Date Filed	#	Docket Text
08/08/2017	64	NOTICE of Appearance filed by attorney Karl R Lindegren on behalf of Defendant Mercedes Benz of Encino (Attorney Karl R Lindegren added to party Mercedes Benz of Encino(pty:dft))(Lindegren, Karl) (Entered: 08/08/2017)
08/09/2017	65	NOTICE TO FILER OF DEFICIENCIES in Electronically Filed Documents RE: Notice of Appearance 64 . The following error(s) was/were found: Incorrect event selected. Correct event to be used is: Notice of Appearance or Withdrawal G123. In response to this notice, the Court may: (1) order an amended or correct document to be filed; (2) order the document stricken; or (3) take other action as the Court deems appropriate. You need not take any action in response to this notice unless and until the Court directs you to do so. (ak) (Entered: 08/09/2017)
09/01/2017	66	STIPULATION to Continue Discovery Cut-Off from 10/19/2017 to 11/30/2017 filed by defendant Mercedes Benz of Encino. (Attachments: # 1

Date Filed	#	Docket Text
		Declaration of Todd Scherwin ISO Joint Stip, # 2 Proposed Order)(Calvert, Colin) (Entered: 09/01/2017)
09/07/2017	67	ORDER ON JOINT STIPULATION TO CONTINUE THE DISCOVERY CUT-OFF DEADLINE by Judge R. Gary Klausner, re Stipulation to Continue 66 , The deadlines and hearings originally scheduled have been rescheduled(Discovery cut-off 11/30/2017.) (bp) (Entered: 09/08/2017)
10/05/2017	68	(STRICKEN PURSUANT TO DKT. 69)Joint STIPULATION to Stay Case pending Defendant's Petition for Certiorari filed by defendant Mercedes Benz of Encino. (Attachments: # 1 Exhibit A page 3)(Calvert, Colin) Modified on 10/6/2017 (ah). (Entered: 10/05/2017)
10/6/2017	69	ORDER TO STRIKE ELECTRONICALLY FILED DOCUMENT by Judge R. Gary Klausner: the following document(s) be STRICKEN for failure to comply with the Local Rules, General Order and/or the

Date Filed	#	Docket Text
		Courts Case Management Order: Stipulation to Stay Case 68 , for the following reasons: Proposed Document was not submitted as separate attachment (L.R. 7-20). Document is incomplete. (ah) (Entered: 10/06/2017)
10/6/2017	70	Joint STIPULATION to Stay Case pending Defendant's Writ of Certiorari filed by defendant Mercedes Benz of Encino. (Attachments: # 1 Exhibit 1 Page 3, # 2 Proposed Order)(Calvert, Colin) (Entered: 10/06/2017)
10/12/2017	71	ORDER ON JOINT STIPULATION TO STAY PROCEEDINGS by Judge R. Gary Klausner. Pursuant to the stipulation of the parties, and good cause appearing, the case is now stayed pending resolution of Defendant's Writ of Certiorari. (pso) (Entered: 10/12/2017)

UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

No. 2:12-cv-08051-RGK-MRW

HECTOR NAVARRO, MIKE SHIRINIAN, ANTHONY PINKINS, KEVIN MALONE, and REUBEN CASTRO,
Plaintiffs,
v.
MERCEDES BENZ OF ENCINO, a Corporation,
Defendant.

Plaintiffs Hector Navarro, Anthony Pinkins, Kevin Malone and Reuben Castro, by and through its attorneys of record, for its Complaint against Defendants, allege as follows:

JURISDICTION

1. Original jurisdiction is had in this action which is being brought pursuant to the *Fair Labor Standards Act* ("FLSA"), codified at 29 U.S.C. § 201, *et seq*.

2. This Court also has supplemental jurisdiction over the California State Law claims under 28 U.S.C § 1367 in that all such claims are so related to claims in this action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution.

VENUE

3. Venue is proper in this Court under 28 U.S.C. § 1391 in that all parties, including the Defendants reside or are domiciled in this State; because all or a

substantial part of the acts, events or omissions giving rise to the claims occurred in this District; and there appears to be no other District in which this action may otherwise be brought.

PARTIES

4. Hector Navarro is and at all times relevant hereto was and individual and a resident of the County of Los Angeles, State of California.

5. Mike Shirinian is and at all times relevant hereto was and individual and a resident of the County of Los Angeles, State of California.

6. Anthony Pinkins is and at all times relevant hereto was and individual and a resident of the County of Los Angeles, State of California.

7. Kevin Malone is and at all times relevant hereto was and individual and a resident of the County of Los Angeles, State of California.

8. Reuben Castro is and at all times relevant hereto was and individual and a resident of the County of Los Angeles, State of California.

9. Mercedes Benz of Encino ("MBE") is believed to be a Corporation existing under the laws of the State of California with its principal place of business in Encino, which is in the County of Los Angeles, State of California.

10. Hector Navarro, Anthony Pinkins, Kevin Malone and Reuben Castro (collectively, ("Plaintiffs") are current or former employees of Defendant MBE pursuant to and as defined in 29 U.S.C. § 203.

11. MBE is or was the employer of Plaintiffs pursuant to and as defined in 29 U.S.C. § 203.

12. MBE at all times alleged herein, was engaged in commerce pursuant to and as defined in 29 U.S.C. § 203.

GENERAL ALLEGATIONS

13. Plaintiffs bring this action to recover for, *inter alia*: failure to pay wages for hours worked, failure to pay overtime wages, failure to pay minimum wages and unpaid meal and rest periods.

14. Plaintiff Reuben Castro is a former and Plaintiffs Hector Navarro, Anthony Pinkins and Kevin Malone are current Service Advisors of MBE, who held and/or currently hold non-exempt positions at MBE in the State of California for a period of time within the four (4) years preceding the filing of this action.

15. MBE owns, operates and manages a Mercedes Benz automobile dealership in Encino, California. MBE sells and services both new and used Mercedes Benz automobiles. As part of the dealership, MBE has a service center where Service Advisors, such as Plaintiffs, are employed to accept cars for service at this dealership. These Service Advisors, including Plaintiffs are mandated to work at MBE from 7:00 a.m. to 6:00 p.m. at least five (5) days a week. During this time period, the Service Advisors, including Plaintiffs are required to remain at their service posts or constantly be "on call" and available by cell phone, email or text message should MBE or its customers need them for anything. While oftentimes these Service Advisors, including Plaintiffs are unable to take a meal or rest break, when indeed they are able to do so, they must remain "on call" and are frequently interrupted to attend to their work duties. Even

during vacations, the Service Advisors, including Plaintiffs must remain "on-call."

16. The job duties and obligations of these Service Advisors, including Plaintiffs are to meet and greet Mercedes Benz owners as they enter the service area of the dealership and then to evaluate the service and/or repair needs of the vehicle owner in light of complaints given them by these vehicle owners. Upon evaluation of the service needs of the vehicle, the Service Advisors, including Plaintiffs then solicit and suggests that certain service be conducted on the vehicle to remedy the complaints of the vehicle owner by conducting certain repairs at MBE and through MBE's own mechanics. The Service Advisors, including Plaintiffs are also duty bound and obligated by MBE to solicit and suggest that supplemental service be performed on the vehicle above and beyond that which is required in response to the initial complaints of the vehicle owner. The Service Advisors, including Plaintiffs then write up an estimate for the repairs and services and provides that to the vehicle owner. The vehicle is then taken to the mechanics at MBE for repair and maintenance.

17. As required by MBE and oftentimes while the vehicle is with MBE mechanics, the Service Advisors, including Plaintiffs will then call the vehicle owner and solicit and suggest that additional work be performed on the vehicle at additional cost.

18. The Service Advisors, including Plaintiffs are not paid a salary or an hourly wage. Instead, MBE mandates that the Service Advisors, including Plaintiffs work on a pure commission basis. Specifically, the Service Advisors', including Plaintiffs'

source of revenue is based on what services he can solicit and suggest to the MBE customer. Thus, the more "up-selling" the Service Advisor does, the greater his commission will be.

19. As part of MBE training and during MBE employee meetings, MBE instructs its Service Advisors, including Plaintiffs to solicit and suggest to the vehicle owner, as many repairs to the vehicle as possible, including "preventative maintenance" or "periodic" or "scheduled" maintenance. With this, MBE derives greater income and revenue and the Service Advisor's, including Plaintiffs' commission is greater.

20. Also part of the Service Advisors' and Plaintiffs' duties and obligations is a mandate of MBE to remain in telephone contact with MBE customers at all times during work Horus. As such, MBE requires the Service Advisors, including Plaintiffs to use MBE phones to keep in such contact.

21. While the Service Advisors, including Plaintiffs work from 7:00 a.m. to 6:00 p.m. daily, not until recently has MBE implemented a system to track and record the work hours of these Service Advisors and Plaintiffs. Thus, MBE has failed for many years to properly account and track the long work hours of these Service Advisors and Plaintiffs.

22. MBE maintains a workplace that violates numerous Federal and California wage and hour laws. Specifically, they exploit and take advantage of their Service Advisors, including Plaintiffs by, *inter alia*, refusing to pay overtime compensation, refusing to pay for all hours worked, refusing to pay minimum

wage, refusing to provide them with meal and rest breaks, and refusing to provide accurate and itemized wage statements.

23. Throughout Plaintiffs' employment, MBE failed to provide Plaintiffs with accurate and itemized wage statements showing, among other things, gross wages earned, total hours worked, net wages earned, and all applicable hourly rates in effect during each pay period and the corresponding number of hours worked at each hourly rate. MBE also failed to maintain complete and accurate payroll records for Plaintiffs showing, among other things, gross wages earned, total hours worked, net wages earned, and all applicable hourly rates in effect during each pay period and the corresponding number of hours worked at each hourly rate.

FIRST CAUSE OF ACTION

VIOLATIONS OF *FAIR LABOR STANDARDS ACT* [29 U.S.C. § 201, *et seq.*]

24. Plaintiffs reallege and incorporate herein by reference, as though set forth in full, each and every allegation contained in Paragraphs 1 through 23, inclusive.

25. Fair Labor Standards Act ("FLSA") regulation 29 C.F.R. § 779.372(c)(4) as originally enacted some time ago, provided that a service manager, service writer, service advisor, or service salesman at an automobile dealership, who is not primarily engaged in the work of a salesman, partsman, or mechanic is not exempt under section 13(b)(10)(A). However, Section 779.372(c)(4) was deleted from the regulations in April 2011.

26. Specifically, on April 5, 2011, the Department of Labor decided not to adopt the proposed changes to Section 779.372(c)(4) and instead, agreed with the position of the AFL-CIO and determined that Service Advisors should be treated as overtime eligible as stated in the current regulation. The Department of Labor announcement went on the say that "the Department has concluded that the current 779.372(c) sets forth the 'appropriate approach' to determining whether employees in such positions are subject to the exemption." 76 Federal Register 18838 (April 5, 2011).

27. Additionally, Industrial Welfare Commission Wage Orders contained in Title 8 of the *California Code of Regulations* (Wage Orders) applies to Plaintiffs in their capacity as employees of MBE. The Wage Orders provide, among other things, that for each hour in excess of forty (40) hours per week and/or each hour in excess of eight (8) hours per day, Plaintiffs should receive pay at not less than one and one-half (1½) times their regular rate of pay. The Wage Orders also provide that for any work in excess of twelve (12) hours per day, Plaintiffs should receive pay at not less than twice their regular rate of pay.

28. Throughout their employment with MBE, Plaintiffs were not exempt employees under the Wage Orders or Federal or California law. Plaintiffs were neither persons employed in an administrative, executive nor professional capacity as defined in the Wage Orders and Federal or California law.

29. Plaintiffs as part of their job duties were required to work in excess of forty (40) hours per week and/or eight (8) hours per day and have not been paid *any* overtime wage.

30. Plaintiffs bring this action to recover the balance of all unpaid wages owed to them, with interest thereon, under the FLSA, for uncompensated overtime as required under the Wage Orders and Federal or California law, to the fullest extent permitted under the statutory time period and pursuant to 29 U.S.C. §§ 215 and 216.

31. In addition to payment of their past wages and all applicable penalties allocable under the law, with interest thereon, Plaintiffs seek attorneys' fees and costs incurred in prosecuting this action under the FLSA [29 U.S.C. §§ 215 and 216].

SECOND CAUSE OF ACTION

VIOLATIONS OF CALIFORNIA *LABOR CODE* § 510 AND 1194, *et seq.*

32. Plaintiffs reallege and incorporate herein by reference, as though set forth in full, each and every allegation contained in Paragraphs 1 through 31, inclusive.

33. Throughout their employment with MBE, Plaintiffs were not exempt employees under the Wage Orders or Federal or California law. Plaintiffs were neither persons employed in an administrative, executive nor professional capacity as defined in the Wage Orders and Federal or California law.

34. Plaintiffs as part of their job duties were required to work in excess of forty (40) hours per week and/or eight (8) hours per day and have not been paid *any* overtime wage. Pursuant to California *Labor Code* § 510, an employer must pay an employee overtime when the employee works more than eight (8) hours a day.

35. Plaintiffs bring this action to recover the balance of all unpaid wages owed to them, with interest thereon, under *Labor Code* §§ 510 and 1194, *et seq.*, for uncompensated overtime as required under the Wage Orders and Federal or California law, to the fullest extent permitted under the statutory time period.

36. In addition to payment of their past wages and all applicable penalties allocable under the law, with interest thereon, Plaintiffs seek attorneys' fees and costs incurred in prosecuting this action under California *Labor Code* § 1194, *et seq.*

THIRD CAUSE OF ACTION

VIOLATIONS OF *FLSA* [29 U.S.C. § 206]

(AGAINST MBE AND DOES 1 TO 50)

37. Plaintiffs reallege and incorporate herein by reference, as though set forth in full, each and every allegation contained in Paragraphs 1 through 36, inclusive.

38. As alleged herein, at all relevant times, the FLSA and Wage Orders applied to Plaintiffs in their capacity as employees of MBE. 29 U.S.C. § 206 states in pertinent part, that every employee shall pay to each employee, not less than $5.85 per hour beginning on the 60th day after May 25, 2007; $6.55 an hour beginning 12 month after that 60th day; and $7.25 an hour, beginning 24 months after that 60th day. The Wage Orders of the State of California provide, among other things, that all employees in California must be paid the minimum wage as required by state law, which is currently eight dollars ($8.00) per hour.

39. As alleged herein, Plaintiffs were required to work for wages less than the legal minimum fixed by California law and/or were required to work without any payment of wages whatsoever.

40. Plaintiffs bring this action to recover the balance of all unpaid wages owed to them, with interest thereon, under 29 U.S.C. § 206 as well as under California *Labor Code* § 1194, *et seq.*, for MBE's failure to pay Plaintiffs the legal minimum wage and/or payment of actual wages for all hours worked as required under the Wage Orders and Federal and California law, to the fullest extent permitted under the statutory time period.

41. In addition, pursuant to the FLSA [29 U.S.C. §§ 215 and 216] and California *Labor Code* § 1194.2, Plaintiffs are entitled to recover liquidated damages in an amount equal to the wages unlawfully unpaid and interest thereon.

42. In addition to payment of their past wages and all applicable penalties allocable under the law, with interest thereon, Plaintiffs will seek attorneys' fees and costs incurred in prosecuting this action under the FLSA [29 U.S.C. §§ 215 and 216] and California *Labor Code* § 1194, *et seq.*

FOURTH CAUSE OF ACTION

VIOLATIONS OF CALIFORNIA *LABOR CODE* §§ 1197 AND 1194, *et seq.*

(AGAINST MBE AND DOES 1 TO 50)

43. Plaintiffs reallege and incorporate herein by reference, as though set forth in full, each and every allegation contained in Paragraphs 1 through 42, inclusive.

44. As alleged herein, at all relevant times, the FLSA and Wage Orders and California Laws applied to Plaintiffs in their capacity as employees of MBE. Pursuant to California *Labor Code* § 1197, "[t]he minimum wage for employees fixed by the commission is the minimum wage to be paid to employees, and the payment of a less wage than the minimum so fixed is unlawful." The Wage Orders of the State of California provide, among other things, that all employees in California must be paid the minimum wage as required by state law, which is currently eight dollars ($8.00) per hour.

45. As alleged herein, Plaintiffs were required to work for wages less than the legal minimum fixed by California law and/or were required to work without any payment of wages whatsoever.

46. Plaintiffs bring this action to recover the balance of all unpaid wages owed to them, with interest thereon, for MBE's failure to pay Plaintiffs the legal minimum wage and/or payment of actual wages for all hours worked as required under the Wage Orders and Federal and California law, to the fullest extent permitted under the statutory time period.

47. In addition, Plaintiffs are entitled to recover liquidated damages in an amount equal to the wages unlawfully unpaid and interest thereon.

48. In addition to payment of their past wages and all applicable penalties allocable under the law, with interest thereon, Plaintiffs will seek attorneys' fees and costs incurred in prosecuting this action.

FIFTH CAUSE OF ACTION

VIOLATIONS OF FLSA [29 U.S.C. § 207]

(AGAINST DEFENDANTS AND DOES 1 TO 50)

49. Plaintiffs reallege and incorporate herein by reference, as though set forth in full, each and every allegation contained in Paragraphs 1 through 43, inclusive.

50. Pursuant to the FLSA [29 U.S.C. § 207] employees must be paid extra compensation for working overtime and no employer shall require an employee to work during any meal or rest period mandated by an applicable order of the Industrial Welfare Commission.

51. During their employment with MBE, Plaintiffs worked hours in excess of eight (8) hours a day and forty (40) hours a week and were denied this right and forced to forgo their legally required meal and rest periods and/or they were interrupted by MBE in violation of law.

52. As a result of MBE's failing to provide them with overtime pay and meal and rest breaks, Plaintiffs sustained damages in the amount of extra compensation due them for each overtime hour as well as wages due and entitled to one (1) additional hour of pay at their regular rate of compensation for each time they were not provided with a meal or rest period, in an exact amount to be determined at trial, to the fullest extent permitted under the statutory time period and pursuant to the FLSA [29 U.S.C. §§ 215 and 216].

53. Plaintiffs will seek attorneys' fees and costs incurred in prosecuting this action under the FLSA [29 U.S.C. §§ 215 and 216].

SIXTH CAUSE OF ACTION

VIOLATIONS OF CALIFORNIA *LABOR CODE* §§ 226.7 AND 512

(AGAINST DEFENDANTS AND DOES 1 TO 50)

54. Plaintiffs reallege and incorporate herein by reference, as though set forth in full, each and every allegation contained in Paragraphs 1 through 48, inclusive.

55. Pursuant to California *Labor Code* §§ 226.7 and 512 employees must be paid extra compensation for working overtime and no employer shall require an employee to work during any meal or rest period mandated by an applicable order of the Industrial Welfare Commission.

56. During their employment with MBE, Plaintiffs worked hours in excess of eight (8) hours a day and forty (40) hours a week and were denied this right and forced to forgo their legally required meal and rest periods and/or they were interrupted by MBE in violation of law.

57. As a result of MBE's failing to provide them with overtime pay and meal and rest breaks, Plaintiffs sustained damages in the amount of extra compensation due them for each overtime hour as well as wages due and entitled to one (1) additional hour of pay at their regular rate of compensation for each time they were not provided with a meal or rest period pursuant to California *Labor Code* § 226.7, in an exact

amount to be determined at trial, to the fullest extent permitted under the statutory time period.

58. Plaintiffs will seek attorneys' fees and costs incurred in prosecuting this action under California *Labor Code* § 1194, *et seq.*

SEVENTH CAUSE OF ACTION

VIOLATION OF VIOLATIONS OF FLSA [29 U.S.C. § 211]

(AGAINST DEFENDANTS AND DOES 1 TO 50)

59. Plaintiffs re-allege and incorporate herein by reference, as though set forth in full, each and every allegation contained in Paragraphs 1 through 53, inclusive.

60. An employer must provide with each payment of wages an accurate itemized statement in writing, showing, *inter alia*, the gross wages earned, total hours worked, net wages earned, and all applicable hourly rates in effect during each pay period and the corresponding number of hours worked at each hourly rate. Furthermore, an employer to afford current and former employees the right to inspect or copy the employment records.

61. MBE failed to provide accurate itemized statements to Plaintiffs at each time of payment of wages furnished to Plaintiffs throughout their employment as required. Additionally, they failed to maintain complete and accurate payroll records, eviscerating Plaintiffs' rights and in violation of the FLSA [29 U.S.C. § 211].

62. As a result of MBE' failing to provide them with accurate itemized wage statements, Plaintiffs sustained damages and are entitled to at least fifty

dollars ($50.00) for the initial pay period and at least one hundred dollars ($50.00) for each subsequent pay period an accurate itemized wage statement was not provided, in an exact amount to be determined at trial, to the fullest extent permitted under the statutory time period. Plaintiffs also sustained damages as a result of MBE's violation of 29 U.S.C. § 211 and is entitled to damages pursuant to 29 U.S.C. §§ 215 and 216.

63. Plaintiffs will seek attorneys' fees and costs incurred in prosecuting this action under the FLSA [29 U.S.C. §§ 215 and 216].

EIGHTH CAUSE OF ACTION

VIOLATION OF CALIFORNIA *LABOR CODE* § 226, *et seq.*

(AGAINST DEFENDANTS AND DOES 1 TO 50)

64. Plaintiffs re-allege and incorporate herein by reference, as though set forth in full, each and every allegation contained in Paragraphs 1 through 58, inclusive.

65. Pursuant to California *Labor Code* § 226(a), an employer must provide with each payment of wages an accurate itemized statement in writing, showing, *inter alia*, the gross wages earned, total hours worked, net wages earned, and all applicable hourly rates in effect during each pay period and the corresponding number of hours worked at each hourly rate. Furthermore, California *Labor Code* § 226(b) requires an employer to afford current and former employees the right to inspect or copy the records pertaining to subdivision (a).

66. MBE failed to provide accurate itemized statements to Plaintiffs at each time of payment of wages furnished to Plaintiffs throughout their employment as required by California *Labor Code* § 226(a). Additionally, they failed to maintain complete and accurate payroll records, eviscerating Plaintiffs' right under California *Labor Code* § 226(b).

67. As a result of MBE' failing to provide them with accurate itemized wage statements, Plaintiffs sustained damages and are entitled to fifty dollars ($50.00) for the initial pay period and one hundred dollars ($50.00) for each subsequent pay period an accurate itemized wage statement was not provided pursuant to California *Labor Code* § 226(e), in an exact amount to be determined at trial, to the fullest extent permitted under the statutory time period.

68. Plaintiffs will seek attorneys' fees and costs incurred in prosecuting this action under California *Labor Code* § 1194, *et seq*.

NINTH CAUSE OF ACTION

VIOLATION OF CALIFORNIA *BUSINESS & PROFESSIONS CODE* § 17200, *et seq.*

(AGAINST DEFENDANTS AND DOES 1 TO 50)

69. Plaintiffs reallege and incorporate herein by reference, as though set forth in full, each and every allegation contained in Paragraphs 1 through 63, inclusive.

70. California *Business & Professions Code* § 17200, *et seq.*, provides that unfair competition shall mean and include "all unlawful, unfair or fraudulent business act or practices and unfair, deceptive, untrue or misleading advertising."

71. Plaintiffs are informed and believe and thereon allege that MBE and DOES 1-50 have engaged in unfair competition in violation of California *Business & Professions Code* § 17200, *et seq.*, by maintaining a workplace rife with wage and hour violations.

72. Such business practices are also a violation of California public policy, including but not limited to the following: California *Constitution*, Article I, § 8, California wage and hour laws, the FLSA and California *Civil Code* § 1770, *et seq.* The maintenance of such unfair business practices allows MBE to maintain an unfair advantage over other companies which comply with these laws, and the public policy of the State of California.

73. MBE falls within the definition of "person" as set forth at California *Business & Professions Code* §§ 17203 and 17506.

74. The unlawful, unfair, and fraudulent business practices of MBE described above present a continuing threat to members of the public in that MBE have or will soon engage in the conduct described above and members of the public are likely to be deceived when they pursue or gain employment with MBE. Pursuant to California *Business & Professions Code* § 17203, Plaintiffs seek an order from this Court that:

a. Provides injunctive and declaratory relief finding that MBE has violated the provisions, of California *Business & Professions Code* § 17200, *et seq.*; and

b. For an order enjoining MBE and its respective successors, agents, servants, officers, directors, employees, and all other persons acting in concert with them, directly or indirectly, from engaging in conduct which violates California *Business & Professions Code* § 17200, *et seq.*

WHEREFORE, Plaintiffs pray for judgment against MBE as follows:

1. For general and compensatory damages, including prejudgment interest, in accordance with exact proof at the time of trial;
2. For unpaid wages, overtime pay, and any other benefits to which Plaintiffs would have been entitled to by reason of their employment with MBE, according to proof;
3. For Plaintiffs' costs and attorneys' fees;
4. For restitution and/or disgorgement of all ill-gotten gains (as to the Ninth Cause of Action);
5. For preliminary and permanent injunction against MBE from the acts of unfair competition as described in the Ninth Cause of Action; and
6. For such other and further relief as the Court may deem just and proper.

DATED: FINK & STEINBERG
September 14, 2012

By: s/Keith A. Fink
Keith A. Fink
Sarah E. Hernandez
Attorneys for Plaintiffs
HECTOR NAVARRO,
MIKE SHIRINIAN,
ANTHONY PINKINS,
KEVIN MALONE and
REUBEN CASTRO

DEMAND FOR JURY

Plaintiffs hereby demand a jury trial on all such claims where a jury trial is permitted.

DATED:
September 14, 2012

FINK & STEINBERG

By: s/Keith A. Fink
Keith A. Fink
Sarah E. Hernandez
Attorneys for Plaintiffs
HECTOR NAVARRO,
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RECORD
AND
BRIEFS

FILED
NOV 1 - 2017
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 16-1362

In the

Supreme Court of the United States

ENCINO MOTORCARS, LLC,

Petitioner,

v.

HECTOR NAVARRO, MIKE SHIRINIAN, ANTHONY PINKINS, KEVIN MALONE, REUBEN CASTRO,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF FOR PETITIONER

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November 1, 2017

QUESTION PRESENTED

Respondents are "service advisors" at a car dealership whose primary job responsibilities involve identifying service needs and selling service solutions to the dealership's customers. Respondents brought suit against the dealership under the Fair Labor Standards Act (FLSA), 29 U.S.C. §§201-219, seeking time-and-a-half overtime pay for working more than 40 hours per week.

The FLSA exempts from its overtime requirements "any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles." *Id.* §213(b)(10)(A). In its first decision in this case, the Ninth Circuit found Respondents non-exempt by deferring to a 2011 Department of Labor regulation. This Court granted certiorari, considered merits briefing and argument, and vacated that decision, holding that "§213(b)(10)(A) must be construed without placing controlling weight on the Department's 2011 regulation." Pet.App.44.

On remand, the Ninth Circuit once again found Respondents non-exempt. As it had in its initial vacated decision, the Ninth Circuit acknowledged that its holding conflicts with published decisions of the Fourth and Fifth Circuits, several district courts, and the Supreme Court of Montana, all of which hold that service advisors are exempt. Pet.App.30, 65.

As it was last time around, the question presented is: Whether service advisors at car dealerships are exempt under 29 U.S.C. §213(b)(10)(A) from the FLSA's overtime-pay requirements.

PARTIES TO THE PROCEEDING

Petitioner Encino Motorcars, LLC, was defendant in the district court and appellee in the Ninth Circuit. Respondents Hector Navarro, Anthony Pinkins, Kevin Malone, and Reuben Castro were plaintiffs in the district court and appellants in the Ninth Circuit.

CORPORATE DISCLOSURE STATEMENT

Encino Motorcars, LLC, is a limited liability corporation doing business as Mercedes Benz of Encino. It has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

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INTRODUCTION

On its return trip to this Court, this case presents a straightforward issue of statutory interpretation. The Fair Labor Standards Act (FLSA) exempts from its overtime-pay requirements "any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles." 29 U.S.C. §213(b)(10)(A). Respondents are service advisors, *i.e.*, they "sell [customers] services for their vehicles." *Encino Motorcars, LLC v. Navarro* (*Encino I*), 136 S. Ct. 2117, 2121 (2016). Their duties include "listening to [customers'] concerns about their cars; suggesting repair and maintenance services; selling new accessories or replacement parts; [and] recording service orders." *Id.* at 2121-22. Respondents, in other words, are "salesm[e]n ... primarily engaged in ... servicing automobiles," and are thus exempt under the plain language of the statute.

Consistent with that straightforward statutory analysis, for more than 40 years, including in enforcement actions brought by the Department of Labor (DOL), every court to address this issue held that service advisors are exempt under §213(b)(10)(A). *See, e.g.*, *Walton v. Greenbrier Ford*, 370 F.3d 446 (4th Cir. 2004); *Brennan v. Deel Motors*, 475 F.2d 1095 (5th Cir. 1973); *Thompson v. J.C. Billion, Inc.*, 294 P.3d 397 (Mont. 2013). Undeterred by that unbroken line of precedent, Respondents brought suit, relying on a 2011 DOL interpretation of §213(b)(10)(A) deeming service advisors non-exempt to allege that they were entitled to time-and-a-half overtime pay for time worked each week in excess of 40 hours.

Invoking the reasoning of the long line of cases holding service advisors exempt, the district court dismissed the complaint. Pet.App.76-85. The Ninth Circuit reversed. Unlike every other court to consider the issue, the Ninth Circuit, relying on the 2011 DOL interpretation, held that service advisors are not exempt under §213(b)(10)(A). Pet.App.55-73.

This Court vacated that decision and remanded for the Ninth Circuit to reconsider the statutory question "without placing controlling weight on [DOL's] 2011 regulation." *Encino I*, 136 S. Ct. at 2127. The Court found deference to DOL's interpretation inappropriate because DOL had abandoned its longstanding acquiescence to the judicial consensus that service advisors were exempt sellers of servicing without "reasoned explanation," and had failed to consider "decades of industry reliance on [DOL's] prior policy." *Id.* at 2126. Two Justices, while agreeing deference was inappropriate, went further and definitively construed the statute to hold service advisors exempt. *See id.* at 2129 (Thomas, J., dissenting).

On remand, the same panel of the Ninth Circuit reverted to the same conclusion for many of the same reasons. Pet.App.1-30. Despite repeatedly acknowledging that service advisors come within the "literal" terms of §213(b)(10)(A)'s exemption, the Ninth Circuit found service advisors to be non-exempt for "the reasons stated in [its] earlier opinion (except those reasons concerning deference to the agency)." Pet.App.30.

The Ninth Circuit's decision to ignore the literal text of §213(b)(10)(A) cannot stand. Service advisors are plainly exempt as "salesm[e]n ... primarily engaged in ... servicing automobiles." Congress' deliberate use of the disjunctive "or" in the phrase "primarily engaged in selling or servicing automobiles" broadens the exemption and makes clear that a salesman is exempt if he is "engaged in" *either* of those activities. And the exemption's coverage of "*any* salesman" demonstrates that Congress intended to legislate broadly.

Despite this clear statutory language, the Ninth Circuit insisted that service advisors were not exempt because they do not "actually" or "personally" service automobiles. Pet.App.13. But exempting only those employees who actually or personally service automobiles injects words into the statute that are not there and introduces an anomaly over the status of "partsmen," who are employees who requisition, stock, and dispense parts. Even though partsmen do not actually or personally service automobiles themselves, they are primarily engaged in the servicing process and are unquestionably exempt under §213(b)(10)(A). So too the service advisors who play an equally vital role in servicing automobiles.

The Ninth Circuit mistakenly believed that the word "salesman" in the exemption could only be paired with "selling," and not "servicing," because other noun-gerund combinations in §213(b)(10)(A) (such as a mechanic primarily engaged in selling automobiles) do not exist in practice. In interpreting a statute with a series of disjunctive nouns and a series of disjunctive gerunds, the courts can and should ignore any combinations that do not exist. But that is no license to ignore combinations, like a "salesman ... primarily engaged in servicing," a.k.a., a service advisor, that most certainly do exist.

The Ninth Circuit's decision upends an area of law that had been settled for more than 40 years. Affirming the decision below would have significant negative consequences for the nation's 18,000 car dealerships, which currently employ an estimated 100,000 service advisors. Those dealerships and their service advisors have operated under mutually beneficial compensation plans designed in good-faith reliance on decades of precedent holding service advisors exempt from the FLSA. This Court has repeatedly rejected plaintiffs' attempts to impose significant retroactive liability on employers who have done nothing more than pay workers in conformity with long-settled industry practice. *See, e.g.*, *Integrity Staffing Sols. v. Busk*, 135 S. Ct. 513 (2014); *Christopher v. SmithKline Beecham*, 567 U.S. 142 (2012). This Court should reject Respondents' attempt to impose substantial and unexpected liability on automobile dealerships based on a countertextual interpretation of the statute that every other court aside from the Ninth Circuit has correctly rejected.

OPINIONS BELOW

The Ninth Circuit's opinion on remand is reported at 845 F.3d 925 and reproduced at Pet.App.1-30. This Court's merits opinion in *Encino I* is reported at 136 S. Ct. 2117 and reproduced at Pet.App.31-54. The Ninth Circuit's initial decision is reported at 780 F.3d 1267 and reproduced at Pet.App.55-73. The district court's opinion is unpublished and is reproduced at Pet.App.76-85.

JURISDICTION

The Ninth Circuit issued its opinion on remand on January 9, 2017, and a petition was timely filed. This Court has jurisdiction under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant provisions of the FLSA, 29 U.S.C. §213, are reproduced in the appendix to this brief.

STATEMENT OF THE CASE

A. Background on the FLSA and Its Many Exemptions for Salespeople

1. Congress enacted the FLSA in 1938 to address "labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers." 29 U.S.C. §202(a). The statute's declared objectives were "to improve ... the standard of living of those who are now undernourished, poorly clad, and ill-housed," and to "protect this Nation from the evils and dangers resulting from wages too low to buy the bare necessities of life and from long hours of work injurious to health." S. Rep. No. 75-884, at 3-4 (1937).

The FLSA's objectives were modest. It was designed to establish "a few rudimentary standards" so basic that "[f]ailure to observe them [would have to] be regarded as socially and economically oppressive and unwarranted under almost any circumstance." *Id.* at 3. The Act thus proscribed the use of child labor, imposed a minimum wage for most jobs, and established a general rule requiring employers to pay overtime compensation at a rate of one-and-a-half times an employee's regular rate of pay for all hours worked in excess of 40 in a week. *See* 29 U.S.C. §§206, 207, 212. An employer that violates the FLSA can be subject to civil liability for back pay, double damages, and attorney's fees. *Id.* §216(b).

From the beginning, the FLSA included a number of exemptions for certain types of employees and employers. *See id.* §213(a), (b). Those exemptions reflect both fundamental business realities and the intuitive proposition that not all employees are best compensated in the same way. Some exemptions broadly cover an entire industry, such as the exemptions for all employees of certain rail and air carriers, *id.* §213(b)(2), (3), or the exemption for all employees engaged in the "catching, taking, propagating, harvesting ... or farming of any kind of fish," *id.* §213(a)(5). Others cover more specific activities, such as the exemption for employees "engaged in the processing of maple sap into sugar." *Id.* §213(b)(15). But all of the exemptions recognize that a one-size-fits-all compensation regime may be unnecessary or even counterproductive for certain types of employees and employers.

2. One common-sense judgment reflected throughout the FLSA is Congress' recognition that individuals engaged in sales or paid on a commission basis are often ill-suited for an hourly compensation regime. The FLSA thus contains several exemptions from its mandatory overtime rules for salespeople (regardless of how they are compensated) and other employees paid on a commission basis. For example, the FLSA exempts from its overtime-pay requirements "any employee employed ... in the capacity of outside salesman." *Id.* §213(a)(1). The statute also exempts certain employees of retail or service establishments who are paid on commission. *Id.* §207(*i*).

Those exemptions reflect the basic reality that salespeople are typically "more concerned with their total work product than with the [number of] hours performed." *Deel Motors*, 475 F.2d at 1097. Consistent with that reality, provisions throughout the FLSA reflect Congress' recognition that it is both common and reasonable for salespeople to be compensated based on their *success at selling* rather than the sheer number of hours worked. This Court has similarly recognized that salespeople are "hardly the kind of employees that the FLSA was intended to protect." *Christopher*, 567 U.S. at 166.

B. The "Salesman, Partsman, or Mechanic" Exemption for Automobile Dealerships

This case addresses the scope of one of the FLSA's many exemptions for salespeople. Under 29 U.S.C. §213(b)(10)(A), the FLSA's overtime-pay requirements do not apply to "any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles, trucks, or farm implements, if he is employed by a nonmanufacturing establishment primarily engaged in the business of selling such vehicles or implements to ultimate purchasers." Pub. L. No. 89-601, §209(b), 80 Stat. 830, 836 (1966). An employee of a car or truck dealership is therefore exempt from the mandatory overtime rules if he or she: (1) is a "salesman, partsman, or mechanic," and (2) is "primarily engaged in selling or servicing automobiles."

Section 213(b)(10)(A) has its origins in an earlier, broader FLSA provision that exempted "any employee" of a car dealership from the overtime-pay requirements. 29 U.S.C. §213(a)(19) (1964); Pub. L. No. 87-30, §9, 75 Stat. 65, 73 (1961). By the mid-1960s, however, Congress concluded that it was neither necessary nor appropriate to exempt *every* employee at a dealership. Dealerships have an array of employees, many of whom perform functions indistinguishable from those performed by non-exempt workers in other contexts. For example, there is no reason a janitor or secretary working at an automobile dealership should be treated differently from a janitor or secretary employed anywhere else.

In 1965, Congress considered legislation to amend the blanket exemption for dealership employees. The initial proposal would have eliminated the automobile dealership exemption altogether. *See* H.R. 8259, 89th Cong., §305 (as introduced in House, May 18, 1965). But Congress quickly concluded that this proposal went too far in the other direction. Dealerships' core sales and service employees were generally well-compensated and/or worked on commission; forcing those employees into the FLSA's mandatory overtime regime would have made little sense in terms of the broader purposes of the statute. Congress thus decided to narrow the dealership exemption rather than repeal it.

In the final legislation, Congress retained the exemption for core dealership employees, including "any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles." Pub. L. No. 89-601, §209(b), 80 Stat. at 836. By contrast, employees who primarily perform support services—such as janitors, cashiers, porters, and secretaries—would no longer be exempt.

C. DOL's Shifting Interpretations of Section 213(b)(10)(A)

1. In 1970, DOL promulgated interpretive regulations that sought to define several key terms in §213(b)(10)(A). *See* 29 C.F.R. §779.372 (1971).[1] Those regulations defined a "salesman" as "an employee who is employed for the purpose of and is primarily engaged in making sales or obtaining orders or contracts for sale of [automobiles]," *id.* §779.372(c)(1), a "partsman" as "any employee employed for the purpose of and primarily engaged in requisitioning, stocking, and dispensing parts," *id.* §779.372(c)(2), and a "mechanic" as "any employee primarily engaged in doing mechanical work ... in the servicing of an automobile ... for its use and operation as such," *id.* §779.372(c)(3).

DOL further asserted that "[e]mployees variously described as service manager, service writer, service advisor, or service salesman who are not themselves primarily engaged in the work of a salesman, partsman, or mechanic ... are not exempt." *Id.* §779.372(c)(4). DOL believed that service advisors should be deemed non-exempt even though it recognized that service advisors are primarily engaged in the servicing of automobiles. *See id.* (noting that "such an employee's principal function may be diagnosing the mechanical condition of vehicles brought in for repair, writing up work orders for repairs authorized by the customer, assigning the work to various employees and directing and checking on the work of mechanics").

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[1] DOL asserted that the Administrative Procedure Act's notice-and-comment procedures were inapplicable because "these are interpretive rules." 35 Fed. Reg. 5856, 5895-96 (1970).

In the years after DOL promulgated these regulations, DOL attempted to vindicate its position through a series of enforcement actions, but every single court to consider the issue rejected the agency's conclusion that service advisors are non-exempt.[2] In *Deel Motors*, for example, DOL advanced the narrow interpretation of the exemption set forth in its 1970 regulation, arguing that service advisors should not be exempt because they do not personally service vehicles. *See* 475 F.2d at 1097-98. The Fifth Circuit rejected that view based on both the text and purpose of the exemption. As a textual matter, the court concluded that service advisors were plainly "salesm[e]n ... engaged in selling or servicing automobiles." *Id.* at 1098. The court further recognized that "service salesmen are functionally similar to the mechanics and partsmen who service the automobiles": all of those employees "work as an integrated unit, performing the services necessary for the maintenance of the customer's automobile." *Id.* at 1097. And, like countless other salespeople exempt from the FLSA's overtime rules, service advisors "are more concerned with their total work product than with the hours performed." *Id.* It would thus make no sense to treat service advisors any differently.

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[2] *See, e.g.*, *Deel Motors*, 475 F.2d at 1097-98; *Yenney v. Cass Cty. Motors*, No. 76-0-294, 1977 WL 1678, at *2 (D. Neb. Feb. 8, 1977); *Brennan v. N. Bros. Ford*, No. 40344, 1975 WL 1074, at *3 (E.D. Mich. Apr. 17, 1975), *aff'd sub nom. Dunlop v. N. Bros. Ford*, 529 F.2d 524 (6th Cir. 1976) (Table); *Brennan v. Import Volkswagen*, No. W-4982, 1975 WL 1248, at *3 (D. Kan. Oct. 21, 1975).

2. Within a few years of the Fifth Circuit's decision in *Deel Motors* and the Sixth Circuit's affirmance in *Dunlop v. North Brothers Ford*, DOL backtracked from the position advanced in its 1970 interpretive regulations and acquiesced in these adverse decisions. In 1978, the Secretary of Labor issued a policy letter changing the agency's position and providing that service advisors should be exempt as long as a majority of their sales were for non-warranty work. *See* U.S. Dep't of Labor, Wage & Hour Div., Opinion Letter on Fair Labor Standards Act, 1978 WL 51403, at *1 (July 28, 1978) (acknowledging that "[t]his position represents a change from the position set forth in" the 1970 regulations).[3]

DOL's 1987 Field Operations Handbook similarly instructed agency employees to "no longer deny the [overtime] exemption for [service advisors]." U.S. Dep't of Labor, Wage & Hour Div., Field Operations Handbook, Insert No. 1757, 24L04-4 (Oct. 20, 1987), *available at* perma.cc/5ghd-kcjj. The Handbook explained that "two appellate courts (Fifth and Sixth Circuits) and two district courts (in the Eighth and Tenth Circuits)" have construed the exemption to cover service advisors. *Id.* The Handbook acknowledged that "[t]his policy ... represents a change from the position in [the 1970 regulations]," and indicated that the agency's regulations "will be revised as soon as is practicable." *Id.*

"[A]s soon as is practicable," however, turned out to be none too soon. Despite DOL's clear (and clearly correct) decision to acquiesce after multiple courts had rejected its initial position and to discontinue any enforcement efforts, the 1970 interpretive regulations with the now-repudiated interpretation of §213(b)(10)(A) remained on the books for decades. It was not until 2008 that DOL initiated a rulemaking proceeding to update its regulations so that, *inter alia*, they reflected the view embraced in the Secretary's 1978 Letter and the 1987 Field Operations Handbook. *See* Updating Regulations Issued Under the Fair Labor Standards Act, 73 Fed. Reg. 43,654 (2008).

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[3] DOL explained that unlike non-warranty work, which is sold by the service advisor, warranty work is sold by the car salesman "when the vehicle is sold." 1978 WL 51403, at *1.

As DOL explained at that time, "[u]niform appellate and district court decisions ... hold that service advisors are exempt under [29 U.S.C. §213(b)(10)(A)] because they are 'salesmen' who are primarily engaged in 'servicing' automobiles." *Id.* at 43,658 (citing *Walton*, 370 F.3d at 452; *Deel Motors*, 475 F.2d at 1097; *N. Bros. Ford*, 1975 WL 1074, at *3). DOL's notice of proposed rulemaking included a modified version of 29 C.F.R. §779.372(c)(4) that would have codified this unbroken line of case law.

3. In 2011, however, DOL changed course abruptly. Rather than codify what it had proposed and what every court had held, DOL issued a final rule that neither adopted the proposed regulation nor brought the regulation into line with the governing case law. *See* Updating Regulations Issued Under the Fair Labor Standards Act, 76 Fed. Reg. 18,832, 18,859 (2011). Instead, DOL reverted to the 1970 regulation's definition of "salesman." *See* 29 C.F.R. §779.372(c)(1).

In its brief explanation accompanying the final rule, DOL said nothing at all about the substantial reliance interests the new rule would upset. Instead, DOL merely repeated its position from the 1970 regulation that service advisors should not be treated as exempt because the regulatory definitions "limit[] the exemption to salesmen who sell vehicles and partsmen and mechanics who service vehicles." 76 Fed. Reg. at 18,838. Indeed, the 2011 regulation eliminated the subsection from the 1970 regulation that expressly stated that service advisors "are not exempt" and provided a modest explanation for the agency's position. *See* 76 Fed. Reg. at 18,859. Thus, the agency eliminated the only regulatory text that even purported to explain the agency's atextual view of the statute. At oral argument in *Encino I*, counsel for the United States explained that this change was "'an inadvertent mistake in drafting.'" 136 S. Ct. at 2124.

D. Respondents' Complaint and the District Court's Decision

Petitioner Encino Motorcars, LLC, sells and services new and used Mercedes Benz automobiles. Like many dealerships, Petitioner "not only sell[s] vehicles but also sell[s] repair and maintenance services." *Encino I*, 136 S. Ct. at 2121. Respondents are current and former employees of Petitioner who worked at the dealership as service advisors. In 2012, specifically invoking the 2011 DOL regulation, Respondents filed a complaint alleging several violations of the FLSA and the California Labor Code. J.A.58.

Respondents' sales activities are integral to the process of servicing vehicles at the dealership. The complaint alleges that, as service advisors, Respondents would "accept cars for service"; "meet and greet ... owners as they enter the service area"; "evaluate the service and/or repair needs" of the owner; "solicit and suggest[] that certain service be conducted on the vehicle"; "solicit and suggest that supplemental service be performed on the vehicle" (such as preventative maintenance); and prepare "estimate[s] for the repairs and services." J.A.54-55. And, like countless other salespeople in both automobile dealerships and other businesses, Respondents were "not paid a salary or an hourly wage" but were paid solely "on a pure commission basis." J.A.55. The more services a service advisor sold, "the greater his commission" would be. J.A.56.[4]

Respondents alleged that they often worked more than 40 hours per week, and that Petitioner violated the FLSA by failing to pay them overtime compensation. J.A.58. While remaining studiously vague on the details of the hours they allege to have worked and the precise damages they seek, Respondents seek time-and-a-half damages on top of the commissions they were paid. J.A.58-59.

Petitioner moved to dismiss the FLSA claims on the ground that Respondents are exempt employees under the plain language of 29 U.S.C. §213(b)(10)(A) and the numerous precedents interpreting the text of that exemption to cover service advisors. The district agreed, holding that a service advisor "falls squarely within the ... positions exempted by" §213(b)(10)(A). Pet.App.81. The district court acknowledged that DOL had stated in 1970 and again in 2011 that

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[4] Some dealerships pay their service advisors a combination of salary or hourly wages and commissions, whereas other dealerships pay service advisors solely on a commission basis.

§213(b)(10)(A) did not apply to service advisors. *See* Pet.App.80-81. But the district court refused to defer to DOL's on-again-off-again interpretation, agreeing with the Fourth and Fifth Circuits that DOL's reading of the statute was objectively unreasonable. Pet.App.83 (rejecting DOL's interpretation as an "impermissibly restrictive construction of the statute" (quoting *Walton*, 370 F.3d at 452)). Because "Service Advisors ... are functionally equivalent to salesmen and mechanics and are similarly responsible for the 'selling and servicing' of automobiles," the district court concluded, it would be "unreasonable" to carve service advisors out of the exemption. *Id.* The court did not believe that "Congress intended to treat employees with functionally similar positions differently," *id.* (quoting *Deel Motors*, 475 F.2d at 1097-98), and dismissed Respondents' FLSA claims.[5]

E. The Ninth Circuit's Initial Decision

The Ninth Circuit reversed in relevant part. The panel conceded that it is "plausible" to "consider a service advisor to be a 'salesman ... primarily engaged in ... servicing automobiles.'" Pet.App.61. Nevertheless, repeatedly invoking the purported canon of construction that "[t]he FLSA is to be construed liberally in favor of employees" and "exemptions are narrowly construed against employers," *see* Pet.App.60 (quoting *Haro v. City of Los Angeles*, 745 F.3d 1249, 1256 (9th Cir. 2014)); *see also* Pet.App.62 (invoking canon); Pet.App.65 (same), the court deemed the statute "ambiguous" because it could not "conclude that service advisors ... are 'persons plainly and unmistakably within [the FLSA's] terms and spirit.'" Pet.App.61 (quoting *Solis v. Washington*, 656 F.3d 1079, 1083 (9th Cir. 2011)).

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[5] After dismissing the FLSA claims, the district court declined to exercise supplemental jurisdiction over Respondents' remaining state-law claims. Pet.App.85.

In light of that perceived ambiguity, the Ninth Circuit afforded *Chevron* deference to DOL's 2011 regulation. Pet.App.62 (citing *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984)). The court concluded that it was "permissible" for DOL to interpret §213(b)(10)(A) so that salesmen are exempt if they are "engaged in selling ... automobiles," but not if (like service advisors) they are "engaged in ... servicing automobiles." Pet.App.65-73. It acknowledged that "there are two reasonable ways to read the statutory text," but concluded that where "the agency has chosen one interpretation, we must defer to that choice." Pet.App.73. The court recognized that its holding "conflicts with decisions of the Fourth and Fifth Circuits, several district courts, and the Supreme Court of Montana," but it "disagree[d] with those decisions." Pet.App.65-66.[6]

F. This Court's First Decision

This Court granted certiorari and, after merits briefing and oral argument, vacated the Ninth Circuit's decision. *Encino I*, 136 S. Ct. at 2127.

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[6] The Ninth Circuit affirmed the dismissal of the other federal claims because Respondents failed to challenge the alternative grounds on which those claims were dismissed. Pet.App.58 n.2. It vacated the dismissal of Respondents' state-law claims for lack of jurisdiction. *Id.*

The Court did not resolve whether service advisors are exempt under the plain text of §213(b)(10)(A). Instead, the Court held that the Ninth Circuit erred by "placing controlling weight on" DOL's 2011 regulation. *Id.* As the Court explained, despite having sharply departed from decades of settled law, DOL "said almost nothing" about why it had made that change. *Id.*; *accord id.* at 2126 (DOL "offered barely any explanation"); *id.* at 2127 (DOL "gave almost no reasons at all"). The Court acknowledged the "serious reliance interests at stake," given that the automobile dealership industry "had relied since 1978" on DOL's position that "service advisors are exempt from the FLSA's overtime pay requirements." *Id.* at 2126-27; *accord id.* at 2126 (noting "decades of industry reliance on the Department's prior policy"); *id.* (observing that "[d]ealerships and service advisors negotiated and structured their compensation plans against this background understanding"). DOL's "lack of reasoned explication" resulted in "a rule that cannot carry the force of law." *Id.* at 2127. The Court thus vacated the Ninth Circuit's decision and remanded for the court of appeals to "interpret the statute in the first instance." *Id.*

Justice Ginsburg, joined by Justice Sotomayor, "agree[d] in full" with the Court's opinion but wrote separately "to stress that nothing in" the decision "disturbs well-established [administrative] law." *Id.* at 2127-28 (Ginsburg, J., concurring). Justice Thomas, joined by Justice Alito, likewise agreed that the DOL regulation merited no deference, but dissented from the decision to remand back to the Ninth Circuit rather than definitively resolve the statutory interpretation question itself. *Id.* at 2129-31

(Thomas, J., dissenting). Justices Thomas and Alito would have held that "service advisors are salesmen primarily engaged in the selling of services for automobiles" and thereby fall within the plain text of the exemption in §213(b)(10)(A). *Id.* at 2129. Justices Thomas and Alito observed that the exemption "contains three nouns ... and two gerunds," all "connected by the disjunctive 'or,'" so "unless context dictates otherwise, a salesman can *either* be engaged in selling *or* servicing automobiles," and "[c]ontext does not dictate otherwise." *Id.* at 2130.[7]

G. The Ninth Circuit's Decision on Remand

On remand, the Ninth Circuit again held that §213(b)(10)(A)'s exemption does not apply to service advisors. Pet.App.1-30.

At the outset, rather than begin with the statutory text, the Ninth Circuit invoked the 1966-67 edition of DOL's Occupational Outlook Handbook to suggest that "salesman" in §213(b)(10)(A) means only "automobile salesman," and not any other sort of "salesman." Pet.App.8-9. It grudgingly acknowledged, however, that "a service advisor qualifies ... as a 'salesman'" under the text of §213(b)(10)(A). Pet.App.10.[8] It further conceded that, "read literally," §213(b)(10)(A)'s exemption "encompasses" a category of employee that readily describes service advisors: "Salesm[e]n primarily engaged in servicing" automobiles. Pet.App.16.

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[7] Since the Court's decision in *Encino I*, DOL has taken no further administrative action with respect to the 2011 regulation.

[8] The court "assume[d] without deciding that [it] must give no weight to [DOL's] interpretation and the regulation" and was instead required to "'interpret the statute in the first instance.'" Pet.App.7 (quoting Pet.App.44-45).

The court nonetheless resisted that "literal" reading of the statute. Pet.App.18-19. First, the court read §213(b)(10)(A)—which exempts "any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles"—to exempt *only* those salesmen, partsmen, and mechanics who either "are actually and primarily occupied in selling cars" or "are actually and primarily occupied in the repair and maintenance of cars." Pet.App.15. The court read this newly invented "actually and primarily occupied in" requirement—which does not appear in the statute—to mean that a salesman, partsman, or mechanic must "personally" sell cars or "personally" "perform[] any repairs []or provide[] any maintenance" in order to be exempt under §213(b)(10)(A). Pet.App.12-13.

Second, the Ninth Circuit observed that the "literal" reading of §213(b)(10)(A) produced six categories of employees—(1) salesmen, (2) partsmen, and (3) mechanics primarily engaged in selling cars; and (4) salesmen, (5) partsmen, and (6) mechanics primarily engaged in servicing cars. The court then observed that two of these categories (2 and 3) "do not exist in the real world." Pet.App.16-17. The court thus reasoned that Congress must have intended for "the gerunds—selling and servicing—to be distributed to their appropriate subjects—salesman, partsman, and mechanic." Pet.App.18. Because "[a] salesman sells; a partsman services; and a mechanic services," the court concluded, Congress must have intended not to exempt a "salesman primarily engaged in servicing." Pet.App.16-18. The court believed that legislative history confirmed its interpretation, despite conceding once again that "the literal terms of the exemption" encompass "salesmen primarily engaged in servicing automobiles." Pet.App.27.

Finally, just as in its first opinion, the Ninth Circuit invoked the purported "rule that the exemptions in §213 of the FLSA 'are to be narrowly construed against the employers seeking to assert them.'" Pet.App.20 (quoting *Arnold v. Ben Kanowsky, Inc.*, 361 U.S. 388, 392 (1960)). While acknowledging that "some members of the Supreme Court have questioned the soundness of the rule of narrow construction," the Ninth Circuit deemed itself bound to apply that canon and to narrow "the literal terms of the exemption" to exclude service advisors. Pet.App.20-21.

In reaffirming its initial holding, the Ninth Circuit again readily admitted that its decision "conflicts with published decisions by the Fourth and Fifth Circuits and by the Supreme Court of Montana." Pet.App.30. The court nonetheless brushed aside that unbroken string of authority "for the reasons stated above and for the reasons stated in [its] earlier opinion (except those reasons concerning deference to the agency)." *Id.*

SUMMARY OF ARGUMENT

The FLSA exempts from its overtime-pay requirements "any salesman ... primarily engaged in selling or servicing automobiles." 29 U.S.C. §213(b)(10)(A). Because service advisors are both salesmen and primarily engaged in servicing automobiles, they are exempt. That common-sense interpretation is confirmed by the statute's plain language, basic rules of grammar, the FLSA's underlying purposes, and a practical understanding of service advisors' role within an automobile dealership. The Ninth Circuit's unjustified departure from a previously unbroken wall of precedent upsets the long-settled expectations of both dealerships and their employees and exposes employers to substantial retroactive liability, while doing nothing to advance the FLSA's purposes.

I. Section 213(b)(10)(A) unambiguously covers service advisors because they are "salesm[e]n ... primarily engaged in selling or servicing automobiles." The phrase "primarily engaged in selling or servicing" is disjunctive, and both gerunds—"selling" and "servicing"—can sensibly be applied to the noun "salesman." Limiting the exemption to salesmen primarily engaged in selling, but not servicing, automobiles flatly contradicts the plain text of the statute, which confers a broader exemption. The exemption applies not just to those primarily engaged in selling, but also to those primarily engaged in servicing.

Basic rules of grammar reinforce that result by dictating that each combination of nouns and gerunds in disjunctive lists be given meaning when it is sensible to do so. Moreover, the statute further emphasizes the breadth of the exemption by extending it to "*any* salesman." There is no question that service advisors are salesmen. And because they sell the servicing of automobiles, they are plainly salesmen *engaged in* servicing automobiles. Indeed, it would be nonsensical to suggest that a salesman primarily engaged in the selling of automobile servicing is engaged in *neither* selling *nor* servicing automobiles. Yet that is the position embraced by Respondents and the Ninth Circuit.

Treating service advisors as exempt also comports with the context of the broader statutory scheme. The FLSA contains many provisions designed to exempt from the overtime rules individuals engaged in sales or paid on a commission basis. *See, e.g.*, 29 U.S.C. §§207(*i*), 213(a)(1). Those exemptions reflect the basic reality that salespeople, including service advisors, "are more concerned with their total work product than with the hours performed." *Deel Motors*, 475 F.2d at 1097. Forcing dealerships to pay overtime to service advisors is a misguided attempt to fit a square peg into a round hole. Salespeople are "hardly the kind of employees that the FLSA was intended to protect." *Christopher*, 567 U.S. at 166.

II. The Ninth Circuit repeatedly acknowledged that the literal terms of §213(b)(10)(A) encompass service advisors, yet it nevertheless held that service advisors are non-exempt by employing reasoning that does not withstand scrutiny. First, rather than grapple with the statutory text, the court invoked a decades-old DOL publication to suggest that service advisors are not even "salesmen," a finding at odds with this Court's *Encino I* decision. Next, the court read into the statute the requirement that an exempt employee "actually" or "personally" repair automobiles in the same manner as a mechanic. The statutory text, of course, contains no such requirement. Worse still, the Ninth Circuit's introduction of those limiting modifiers conflicts with Congress' conscious decision to include partsmen in the exemption. Partsmen are no more (or less) "actually" or "personally" involved in repairing automobiles than service advisors, yet the statute plainly renders partsmen exempt. Like service advisors, partsmen are primarily engaged in servicing automobiles without directly doing the servicing themselves.

Furthermore, despite the clearly disjunctive statutory language, the Ninth Circuit interpreted §213(b)(10)(A) so that the noun "salesman" is modified only by the gerund "selling," and not the gerund "servicing." The court based this conclusion on the fact that two of the six possible noun-gerund combinations in the exemption—partsmen engaged in selling cars, and mechanics engaged in selling cars—do not exist in the real world. But the practical non-existence of some noun-gerund combinations does not justify declining to apply the exemption to all noun-gerund combinations that actually exist, such as "salesmen ... engaged in servicing," *i.e.*, service advisors. That is particularly true where, as here, there are three antecedent nouns but only two consequent gerunds, defeating a one-to-one mapping of nouns to gerunds.

Finally, the Ninth Circuit relied on legislative history and the supposed rule that FLSA exemptions should be narrowly construed. Because the unambiguous statutory text exempts service advisors, resort to legislative history is inappropriate. But in all events, even the Ninth Circuit was forced to acknowledge that the legislative record is opaque and does not directly address whether the exemption applies to service advisors. The court was thus forced to rely on legislative silence, post-enactment history, and statements by non-legislators, all of which are the kinds of extraneous materials that give legislative history a bad name. And the Ninth Circuit's use of its "rule" of narrowly construing FLSA exemptions to avoid "the literal terms" of the statute underscores the dangers of that rule. This Court has in recent decisions properly declined to apply that misguided rule, but the time has come to inter it once and for all. Like all statutes, the FLSA should be interpreted neither narrowly or broadly, but fairly and correctly.

If allowed to stand, the Ninth Circuit's erroneous interpretation of §213(b)(10)(A) would have far-reaching implications for the nation's 18,000 franchised car dealerships and 100,000 service advisors. That interpretation would result in a wholesale reworking of the service advisor position, harming dealerships and service advisors alike. This Court has been justifiably skeptical of attempts by plaintiffs to impose significant retroactive liability for settled industry practices long viewed as outside the scope of the FLSA. *See, e.g.*, *Integrity Staffing*, 135 S. Ct. at 518-19. Here, the longstanding industry practice was encouraged by settled precedent and administrative guidance for over four decades. This Court should reject Respondents' and the Ninth Circuit's attempts to impose massive retroactive liability on employers for compensation arrangements that have been repeatedly—and correctly—approved for decades by courts nationwide.

ARGUMENT

I. Service Advisors Are Unambiguously Exempt Because They Are Salesmen Primarily Engaged In Servicing Automobiles.

Service advisors are unambiguously exempt from the FLSA's overtime-pay requirements. The statute exempts "any salesman ... primarily engaged in selling or servicing automobiles," and service advisors are salesmen primarily engaged in servicing automobiles. It is therefore unsurprising that every court to consider this issue, save the Ninth Circuit, has found service advisors to be exempt.

A. Service Advisors Are Exempt Under the Plain Language of Section 213(b)(10)(A).

1. The FLSA exempts from its overtime requirements "any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles, trucks, or farm implements, if he is employed by a nonmanufacturing establishment primarily engaged in the business of selling such vehicles or implements to ultimate purchasers." 29 U.S.C. §213(b)(10)(A). There is no dispute that Petitioner is "a nonmanufacturing establishment primarily engaged in the business of selling [automobiles] to ultimate purchasers." *Id.* The question is thus whether each Respondent is a "salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles." *Id.*

Service advisors are unquestionably "salesmen." As this Court previously explained, the duties of a service advisor include "listening to [customers'] concerns about their cars; suggesting repair and maintenance services; selling new accessories or replacement parts; [and] recording service orders." *Encino I*, 136 S. Ct. at 2121-22. In short, service advisors "sell [customers] services for their vehicles." *Id.* at 2121; *see also id.* at 2127 (service advisors are "employees who sell services"). Respondents are plainly salesmen.

And Respondents are just as plainly "primarily engaged in ... servicing automobiles." Most automobile dealerships offer service and sales, and Respondents are the salesmen dedicated to the servicing side of the business: they help diagnose the need for service, provide information about optional services, and, having formed a relationship with the customer, help to ensure the customer is satisfied with the service received. *See id.* at 2121-22. Indeed, Respondents' own complaint makes clear that service advisors are integral to servicing vehicles at the dealership: among other things, they "accept cars for *service*," "meet and greet ... owners as they enter the *service* area," "evaluate the *service* and/or repair needs" of the owner, "solicit and suggest[] that certain *service* be conducted on the vehicle," "solicit and suggest that supplemental *service* be performed on the vehicle," and prepare "estimate[s] for the repairs and *services*." J.A.55 (emphases added). Accordingly, under the plain text of §213(b)(10)(A), service advisors like Respondents are exempt because they are "salesmen" who are "primarily engaged in ... servicing automobiles."

2. Several powerful grammatical and textual indicators confirm this straightforward reading of the statutory text. First, it is a fundamental rule of grammar that when a sentence has multiple disjunctive nouns and multiple disjunctive direct-object gerunds, each noun is linked to each gerund as long as that noun-gerund combination has a sensible meaning. *See, e.g.*, *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979) ("Canons of construction ordinarily suggest that terms connected by a disjunctive be given separate meanings, unless the context dictates otherwise...."); *FCC v. Pacifica Found.*, 438 U.S. 726, 739-40 (1978) ("The words ... are written in the disjunctive, implying that each has a separate meaning.").

Here, §213(b)(10)(A) specifically exempts "any salesman ... primarily engaged in selling *or* servicing automobiles." There is no question that the term "or" makes the phrase "primarily engaged in selling or servicing" disjunctive. *See Thompson*, 294 P.3d at 402 ("The use of the disjunctive 'or' between the words 'selling *or* servicing' means that the exemption applies to any 'salesman, partsman, or mechanic' who [is] primarily engaged in either of these duties."). Nor is there any question that, in the context of an exemption limited by a requirement that the employee be primarily engaged in a particular activity or activities, the use of the disjunctive broadens the exemption. An exemption provided to employees primarily engaged in X or Y is broader than one given only to employees primarily engaged in X. Thus, as long as both X and Y can be sensibly applied to a subject noun, the broader meaning promised by the use of the disjunctive must be honored.

There can be no real dispute that both gerunds ("selling" and "servicing") can sensibly be applied to the noun "salesman." There are a variety of salespeople at automobile dealerships. Some salespeople are "engaged in selling ... automobiles." But other salespeople play an integral role in the service process. In particular, there are approximately *100,000* service advisors nationwide who "engage[] in" classic sales functions just like other salespeople, but sell services instead of goods. *See* Br. for *Amici Curiae* Nat'l Auto. Dealers Ass'n et al. ("NADA Cert. Amicus Br.") at 5-6; J.A.55-56 (describing Respondents as employees who "work on a pure commission basis" and "solicit and suggest[] that certain service[s] be conducted on" cars that come in for servicing). The sale of automobile servicing by service advisors, moreover, is no trifling matter. At the average dealership, service department sales account for 44% of gross profits, while new automobile sales account for only 30%. Philip Reed, *Where Does the Car Dealer Make Money?*, Edmunds (Dec. 3, 2013), http://edmu.in/2pUoejw; *see also id.* (explaining that dealerships "know that there's a good chance that a car buyer will bring the vehicle in for regular service," so "even if the dealership only ekes out a thin margin on a new car sale, there's the possibility of continued cash flow from a service relationship"). A salesman who engages in servicing is thus not an insignificant anomaly, but an important component of the dealership model.

In short, because both parts of the disjunctive phrase "engaged in selling or servicing automobiles" can be sensibly applied to the noun "salesman," fundamental rules of grammar dictate that both parts of the phrase be given their plain meaning. A service advisor, in other words, fits comfortably within the category of a "salesman ... primarily engaged in ... servicing automobiles."

At the very least, the entire phrase "primarily engaged in *selling or servicing* automobiles" applies to service advisors. Service advisors are certainly not primarily engaged in any activity *other than* selling or servicing. And they are not engaged in selling or servicing anything other than automobiles. In fact, they are engaged in the selling of the servicing of automobiles. *See, e.g.*, *Encino I*, 136 S. Ct. at 2121-22 ("Service advisors interact with customers and sell them services for their vehicles."). It would be nonsensical to suggest that an individual primarily engaged in selling the servicing of automobiles is engaged in *neither* selling *nor* servicing automobiles.

If the exemption applied only to salesmen primarily engaged in selling automobiles, it might have made sense to argue that service advisors are non-exempt because they sell services for automobiles rather than the automobiles themselves. But given that the exemption covers both selling and servicing, it makes no sense to hold that service advisors are non-exempt because they are primarily engaged in selling services and not automobiles.[9] The notion that service advisors could be non-exempt because they are too involved in servicing makes nonsense of Congress' decision to employ the broadening disjunctive.

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[9] Similarly, if an employee spent 40% of his time engaged in selling automobiles, 30% of his time engaged in selling servicing, and 30% of his time doing something else, he would still be primarily engaged in selling or servicing automobiles, even though he might not be primarily engaged in one or the other. Congress' use of the disjunctive necessarily broadens the exemption.

The breadth of the exemption is further confirmed by Congress' decision to use the broad phrase "engaged in." Congress obviously could have limited §213(b)(10)(A) to a "salesman, partsman, or mechanic who sells or services automobiles," or even a "salesman, partsman, or mechanic who primarily sells or services automobiles." That Congress instead chose to exempt a "salesman, partsman, or mechanic primarily *engaged in* selling or servicing automobiles" indicates an evident intent to broaden the category of exempt employees beyond just those dealership employees who personally go under the hood to service cars or personally go out on the lot to sell them. *Compare* 29 U.S.C. §203(j) (defining "[p]roduced" as "produced, manufactured, mined, handled, or in any other manner worked on"), *with id.* (defining "engaged in the production of goods" more broadly, as "employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or *in any closely related process or occupation directly essential to the production thereof*" (emphasis added)).

So too with Congress' choice to extend §213(b)(10)(A) to "*any* salesman" primarily engaged in one of two defined activities (selling or servicing). This Court has repeatedly emphasized that, "[r]ead naturally, the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.'" *United States v. Gonzales*, 520 U.S. 1, 5 (1997) (quoting Webster's Third New Int'l Dictionary 97 (1976)); *see also Dep't of Housing & Urban Dev. v.*

Rucker, 535 U.S. 125, 130-31 (2002). Congress' use of the word "any" in §213(b)(10)(A) thus makes clear that it intended to exempt *all* salesmen working in an automobile dealership, as long as they are "primarily engaged in selling or servicing automobiles." Service advisors fall comfortably within that category of exempt employees.

3. Given the clarity of the statutory text, it is unsurprising that every court to consider this issue (until the Ninth Circuit) concluded that service advisors are exempt. For example, in *Walton*, the Fourth Circuit held that service advisors fall within the plain text of the FLSA's overtime-pay exemption. The *Walton* plaintiff's job duties were identical to Respondents' job duties here: he would "greet customers, listen to their concerns about their cars, write repair orders, follow-up on repairs, ... keep customers informed about maintenance, [and] ... suggest to customers additional services." 370 F.3d at 449. The Fourth Circuit correctly recognized that service advisors are "primarily engaged in servicing automobiles" because they are an "integral part of the dealership's servicing of automobiles" and are the "first line ... service sales representative[s]." *Id.* at 452-53.

Similarly, in *Deel Motors*, the Fifth Circuit held that service advisors are exempt from the FLSA. 475 F.2d 1095. There, too, the court recognized that service advisors perform functions that fall squarely within the statutory exemption. *Id.* at 1097-98. And, in *Thompson*, the Montana Supreme Court agreed with the Fourth and Fifth Circuits that the §213(b)(10)(A) exemption covers service advisors. 294

P.3d at 402. The court found no ambiguity in the relevant statutory text because a "plain, grammatical reading of [§213(b)(10)(A)] makes clear that the term 'salesman' encompasses a broader category of employees than those only engaged in selling vehicles." *Id.* Finally, the federal district courts that have addressed this issue—including the district court in this case—have also uniformly concluded that §213(b)(10)(A) applies to service advisors. *See, e.g.*, *Yenney*, 1977 WL 1678; *N. Bros. Ford*, 1975 WL 1074, *aff'd sub nom. Dunlop*, 529 F.2d 524; *Import Volkswagen*, 1975 WL 1248; Pet.App.76-85. All of these courts have recognized that service advisors are exempt under a straightforward textual interpretation of §213(b)(10(A).

B. Treating Service Advisors as Exempt Is Consistent With the FLSA's Structure and Broader Purposes.

Treating service advisors as exempt comports with the broader scheme of the FLSA and the broader scheme of a dealership's sales and service staff. *See Sturgeon v. Frost*, 136 S. Ct. 1061, 1070 (2016) (deeming it "fundamental" that "the words of a statute must be read in their context and with a view to their place in the overall statutory scheme"). The FLSA contains several provisions (in addition to §213(b)(10)(A)) designed to exclude from the mandatory overtime rules individuals engaged in sales or paid on a commission basis. *See, e.g.*, 29 U.S.C. §207(*i*) (excluding certain employees of retail or service establishments who are paid commissions); *id.* §213(a)(1) (excluding "any employee employed ... in the capacity of outside salesman").

Those provisions, as well as §213(b)(10)(A), reflect the basic reality that it is both common and reasonable for salespeople to be compensated based on their *success at selling* rather than their sheer number of hours worked. As the Fifth Circuit has explained, "[t]he enactment of [§213(b)(10)(A)] was an implicit recognition by Congress of the incentive method of remuneration for salesmen, partsmen, and mechanics employed by an automobile dealership." *Deel Motors*, 475 F.2d at 1098. Like countless other salespeople treated as exempt under the FLSA, service advisors "are more concerned with their total work product than with the hours performed." *Id.* at 1097. Forcing an employer to pay service advisors—who are quintessential salespeople—overtime compensation on an hourly basis would be a misguided attempt to fit a square peg into a round hole, and would do nothing to promote the policies underlying the FLSA. *See, e.g.*, *Christopher*, 567 U.S. at 166 (noting that pharmaceutical sales representatives "are hardly the kind of employees that the FLSA was intended to protect").

That problem is particularly acute in cases like this and *Christopher*, when there is a belated effort to treat salespeople as exempt. Because their compensation is often driven by commissions, salespeople may work irregular hours and not keep meticulous records of how long they work. Based on their compensation structure, salespeople often keep closer track of their sales than their hours—much like Respondents did here. *See* J.A.56-57 (Respondents acknowledging that their "work hours" were not tracked or recorded).

Interpreting §213(b)(10)(A) to include service advisors ("salesm[e]n ... primarily engaged in ... servicing automobiles") would avoid forcing dealerships to differentiate among their employees in ways that are both divisive and contrary to Congress' plain intent. Service advisors are a key component of the service team, a team that includes plainly exempt partsmen and mechanics. Having one key member of the service team non-exempt, while the other two-thirds are exempt, makes little sense and could sow division. Moreover, service advisors are in some sense a hybrid, because their job is to sell, but they sell services. If the salesforce were entirely exempt and the service staff (such as mechanics and partsmen) were entirely non-exempt, there would be an argument for treating service advisors as non-exempt. But to treat a hybrid between two *fully exempt* categories as non-exempt makes no sense and needlessly creates fissures among similar employees that Congress plainly did not intend.

Finally, forcing service advisors into the FLSA's mandatory overtime regime would not advance the core policy goals underlying the FLSA. As *amici* noted in their brief supporting the petition for certiorari, service advisors in the states within the Ninth Circuit earn an average of $68,995 per year, and the top 10% earn on average $103,560. NADA Cert. Amicus Br. at 7-8. This is not a case that implicates the FLSA's core concern of protecting workers from "wages too low to buy the bare necessities of life." S. Rep. No. 75-884, at 4.

II. The Ninth Circuit's Anomalous And Far-Reaching Decision Improperly Interpreted Section 213(b)(10)(A).

The Ninth Circuit repeatedly acknowledged that under a literal reading of §213(b)(10)(A), service advisors are exempt from the FLSA's overtime-pay requirements. *See* Pet.App.16 ("Read literally, the exemption encompasses [service advisors]."); Pet.App.27 ("[T]he literal terms of the exemption could encompass [service advisors]."); *see also* Pet.App.12-13 ("[S]ervice advisors can be said, in a general sense, to be 'primarily engaged in ... servicing automobiles.'"); Pet.App.21 ("[T]he statute could be construed as exempting service advisors."). It nevertheless held that service advisors are non-exempt, becoming the only court to so hold in the nearly fifty years since the exemption was enacted. That the Ninth Circuit is an outlier should be no surprise. Its decision is unmoored from both the text and purpose of §213(b)(10)(A) and would have far-reaching implications for the nation's 18,000 franchised car dealerships and 100,000 service advisors.

A. The Ninth Circuit Badly Misconstrued Section 213(b)(10)(A).

1. The Ninth Circuit's interpretation of §213(b)(10)(A) went awry right out of the gate. "Statutory interpretation ... begins with the text." *Ross v. Blake*, 136 S. Ct. 1850, 1856 (2016); *see also, e.g.*, *Carter v. United States*, 530 U.S. 255, 271 (2000). Here, however, "following that approach at once distances us from the Court of Appeals." *Ross*, 136 S. Ct. at 1856.

Rather than begin "as ... always" with the statutory text, *id.*, the Ninth Circuit looked first to a decidedly less authoritative source: the 1966-67 edition of the Occupational Outlook Handbook ("OOH"), published by the Labor Department's Bureau of Statistics. *See* Pet.App.8-11. In the Ninth Circuit's view, "three job titles" in the OOH—"Automobile mechanics," "Automobile parts countermen," and "Automobile salesmen"—"clearly align with the three job titles exempted by Congress." Pet.App.9. Therefore, the court concluded, any other dealership-related occupation listed in the OOH but not listed in the statute—like "Automobile service advisors"—is non-exempt. *Id.*

That reasoning is flawed in multiple respects. Most fundamentally, congressional intent cannot be gleaned from a document written by executive department staffers. Understandably, this Court has never relied on the OOH as evidence of congressional intent. In fact, this Court has never relied on the OOH for *anything*. It has never cited the OOH in any opinion—not a majority, plurality, concurrence, or dissent.[10] And there appears to be no evidence that Congress considered the OOH in enacting or amending §213(b)(10)(A).

But even assuming that the OOH had some marginal relevance, the Ninth Circuit's analysis would remain unsound. The court believed that because "three job titles" in the OOH "clearly align with the three job titles exempted by Congress," any other OOH job title is beyond the exemption's scope. Pet.App.9. But this reasoning assumes that Congress exempted only "three job titles" in §213(b)(10)(A), which is the very statutory interpretation question to be answered. And the actual statutory text reveals that Congress did not simply enact a provision exempting "any automobile salesman, automobile parts counterman, or automobile mechanic," *i.e.*, a statute "clearly align[ed]" with three OOH titles. Rather, Congress enacted a considerably broader provision exempting "any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles," which "literally"—as even the Ninth Circuit conceded—includes a service advisor. Indeed, although there is no evidence that Congress gave the OOH even a minute of consideration in enacting or amending §213(b)(10)(A), even if it had, the fact that Congress enacted an exemption that did not follow the OOH's lead and simply list and exempt the OOH's three job titles, but instead employed different and broader language, would only strengthen the case for giving the text its literal reach. *See Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 133 S. Ct. 2517, 2529 (2013) ("Congress' choice of words is presumed to be deliberate[.]").

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[10] Likewise, the courts of appeals have invoked the OOH in only a handful of decisions, only one of which (besides the decision below) involved the FLSA.

Finally, the Ninth Circuit's OOH-driven analysis cannot be reconciled with this Court's decision in *Encino I*. Under the Ninth Circuit's reasoning, service advisors do not even qualify as "salesmen" under §213(b)(10)(A), because "salesmen" means only the job title listed in the OOH—"automobile salesmen," *i.e.*, salesmen who sell cars. But this Court recognized in *Encino I* that service advisors *are* "salesmen." *See* 136 S. Ct. at 2121 (service advisors "sell [customers] services for their vehicles"); *id.* at 2127 (service advisors are "employees who sell services"); *see also id.* at 2129 (Thomas, J., dissenting) (noting the "uncontroversial notion that a service advisor is a 'salesman'"). Perhaps for that reason, the Ninth Circuit ultimately conceded that "a service advisor qualifies, in a generic sense, as a 'salesman.'" Pet.App.10. But if that is true, there is no reason to consult extraneous sources to limit the statute to "automobile salesmen" when the statute literally extends to any salesman primarily engaged in selling *or* servicing automobiles.[11]

2. Having resisted the straightforward conclusion that service advisors are "salesmen," the Ninth Circuit then resisted the straightforward conclusion that service advisors are "salesmen ... primarily engaged

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[11] While consulting extraneous non-textual materials, the Ninth Circuit refused to give any significance to the word "any" in the text of §213(b)(10)(A). Pet.App.10 n.4. The court claimed that every FLSA exemption begins with "any," so the use of "any" was "a drafting convention, not an expression of congressional intent that we interpret a particular exemption expansively." *Id.* Even accepting the court's premise, *but see* 29 U.S.C. §213(b)(30) (exempting "*a* criminal investigator who is paid availability pay" (emphasis added)), there is no basis for disregarding the significance of the word "any" just because Congress chose to use it repeatedly in many FLSA exemptions. A "drafting convention" is still a deliberate decision—indeed, a repeated deliberate decision—to utilize a particular word that "has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.'" *United States v. Gonzales*, 520 U.S. 1, 5 (1997). And to the extent Congress employed this deliberate, broad phrase as a "drafting convention" in formulating virtually all FLSA exemptions, that is just one more reason the supposed canon of interpreting those exemptions narrowly is fundamentally atextual and misguided. *See* pp. 48-50, *infra*.

in ... servicing automobiles." Pet.App.11-19. The court's reasoning does not withstand scrutiny.

The Ninth Circuit first offered an alternative interpretation of §213(b)(10)(A) in which the words "actually" or "personally" are injected into the statute to modify "selling" and "servicing." Pet.App.11-16. In the court's view, the phrase "primarily engaged in ... servicing automobiles" encompasses "only those who are *actually* occupied in the repair and maintenance of cars." Pet.App.12 (emphasis added); *see also* Pet.App.15 ("[T]he phrase 'primarily engaged in ... servicing automobiles' encompasses only those who are actually and primarily occupied in the repair and maintenance of cars."). To "primarily engage in an activity," the court further reasoned, means to "perform personally" or "actually undertake" the activity. Pet.App.13. Because a service advisor does not "actually" or "personally" perform repairs and maintenance, the court concluded, "service advisors are not primarily engaged in servicing automobiles." Pet.App.12-13.

The most obvious problem with that construction is that neither the word "actually" nor the word "personally" appears in the statute Congress enacted. The notion that an exempt employee must actually or personally service automobiles requires adding restrictive modifiers that are absent from the statutory text. It goes without saying that this Court "ordinarily resist[s] reading words ... into a statute that do not appear on its face." *Dean v. United States*, 556 U.S. 568, 572 (2009). Indeed, the Ninth Circuit's felt need to inject words into the statute to produce its favored reading only underscores that the statute as actually written exempts service advisors whether or not they actually or personally get under the hood to service automobiles themselves.[12]

The injection of new words into the statute alone would be problematic enough, but the Ninth Circuit would add words to the statute only to render another word that is actually there—"partsman"—superfluous. Partsmen are plainly exempt employees under the statute, but they do not actually or personally service automobiles the way mechanics do. Instead, as DOL itself has recognized, partsmen are "employed for the purpose of and primarily engaged in requisitioning, stocking, and dispensing parts." 29 C.F.R. §779.372(c)(2); *see also* 112 Cong. Rec. 20,502 (1966) (statement of Sen. Birch Bayh) (describing a partsman as one who "classifies, shelves and dispenses parts used by mechanics and sold to customers who come into establishments to make purchases"). By requiring those "primarily engaged in

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[12] To the extent the Ninth Circuit would tie its atextual "actually" or "personally" requirement to the statutory phrase "primarily engaged in," that construction is doubly wrong. "Primarily" is a drafting convention employed in multiple FLSA exemptions that ensures that someone who spends only a small part of their workday on exempt activities cannot claim an exemption. *See, e.g.*, 29 U.S.C. §207(j) (exemption for "employer[s] engaged in the operation of a hospital or an establishment which is an institution primarily engaged in the care of the sick, the aged, or the mentally ill or defective who reside on the premises"); *see also id.* §214(a) (authorizing the Secretary to "provide for the employment of learners, of apprentices, and of messengers employed primarily in delivering letters and messages"). And, as already noted, "engaged in" is a term that broadens, rather than narrows, the reach of the exemption. *See* p. 30, *supra*.

... servicing automobiles" to "actually" or "personally" perform repairs to automobiles, the Ninth Circuit read "partsman" out of the statute.

The Ninth Circuit's only answer to this violation of the duty to "give effect to every word of a statute," *Leocal v. Ashcroft*, 543 U.S. 1, 12 (2004), is thoroughly unpersuasive. According to the Ninth Circuit, partsmen *do* "actually" and "personally" perform repairs and maintenance of cars—or, at least, enough to satisfy the court's vague conception of that supposed requirement—because they "test parts" and "repair parts." Pet.App.14-15. The problems with that argument are legion. First, for the proposition that partsmen "test parts" and "repair parts," the Ninth Circuit relied exclusively on the 1966-67 OOH, repeating all the errors of its previous reliance on that document. *See* p. 36, *supra*.[13]

Second, that proposition is at odds with DOL's regulation describing partsmen as "employed for the purpose of and primarily engaged in requisitioning, stocking, and dispensing parts." 29 C.F.R. §779.372(c)(2). As the DOL regulation makes clear, even if partsmen, on occasion, test and repair parts—and thus, on occasion, actually or personally repair and maintain cars (per the Ninth Circuit's definition)—partsmen are not *primarily engaged in* testing or repairing parts, and thus they are not *primarily engaged in* "servicing" under the Ninth Circuit's misguided definition.

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[13] The Ninth Circuit also cited an *amicus* brief filed in *Encino I*, but only for the unremarkable proposition that a partsman works with both mechanics and customers. *See* Pet.App.14.

Third, the Ninth Circuit's effort to construe "actually" or "personally" broadly enough to cover partsmen would also be broad enough to bring in service advisors (contrary to the Ninth Circuit's whole purpose in injecting the words into the statute). If a partsman "actually" or "personally" services a vehicle by "determin[ing] an appropriate replacement part and locat[ing] it for a mechanic," in a manner that "contribute[s] directly to the actual repair of a car," Pet.App.15, then a service advisor also passes the test. A service advisor accepts a car for repair, evaluates repair needs, suggests certain repairs, discusses repairs with the customer and the mechanic, and ensures that the customer is satisfied with the repairs—all tasks that "contribute directly to the actual repair of a car." *See Encino I*, 136 S. Ct. at 2121-22; J.A.55. Indeed, in a contest between service advisors and partsmen as to which group spends more time under the hood, the service advisors would likely win since the initial evaluation of servicing needs often involves looking under the hood. But there is no need to settle that contest, as the proper course is not to inject words into a statute to exclude service advisors and then interpret those added terms idiosyncratically in an effort to sweep partsmen back in. In reality, both partsmen and service advisors are integral to the servicing process even though neither group spends the majority of the day under the hood in the same way as a mechanic.

At bottom, the Ninth Circuit's misguided attempt to salvage "partsmen" only underscores the error of its injecting "actually" or "personally" into §213(b)(10)(A). While the statute as redrafted by the Ninth Circuit creates confusion over partsmen, the statute that

Congress actually drafted unambiguously exempts both partsmen and service advisors because both types of employees are *primarily engaged in servicing automobiles*, which is all the clear statutory text requires.

3. The Ninth Circuit supported its flawed interpretation of §213(b)(10)(A) by appealing to a "holistic reading" of the exemption. Pet.App.16-19. The court was concerned that a "literal" reading of §213(b)(10)(A) produced six categories of employees, including a category of employee that readily describes service advisors: "Salesm[e]n primarily engaged in servicing" automobiles. Pet.App.16. Indeed, the court expressly conceded that by producing "the literal category of a 'salesman ... primarily engaged in ... servicing automobiles,'" the statute "could be construed as exempting service advisors." Pet.App.21. But because a "literal" reading also produced two categories of employees that "do not exist in the real world"—partsmen primarily engaged in selling automobiles, and mechanics primarily engaged in selling automobiles—the court believed that Congress could not have intended to pair "salesman" with "servicing." Pet.App.17. Rather, Congress intended to pair "salesman" only with "selling." Pet.App.18.

The court's conclusion is a *non sequitur*. The theoretical possibility of practically non-existent noun-gerund combinations from two disjunctive lists is no excuse for declining to extend the exemption to all the noun-gerund combinations that actually exist in the real world. In implementing an instruction to feed "hungry or barking cats or dogs," the non-existence of barking cats is no justification for leaving a plainly famished, but mute, dog unfed.

So too in statutory construction. Where a particular theoretical combination of disjunctive nouns and gerunds produces a practical null set (*e.g.*, "partsm[e]n [or] mechanic[s] primarily engaged in selling ... automobiles"), the null set can be safely ignored. Courts need not worry about the purely theoretical combinations because no case will raise the issue; after all, partsmen and mechanics primarily engaged in selling cars "do not exist." Pet.App.17. But where, as here, the combinations are eminently sensible—*i.e.*, where tens of thousands of "salesm[e]n ... primarily engaged in ... servicing automobiles" actually exist and are currently at work in the United States—the "literal" reading of the plain statutory text is the correct one.

Rather than ignore the non-existent categories produced by the two disjunctive lists, the Ninth Circuit chose to ignore the literal reach of the statute and limit the gerund "selling" to salespeople and limit the gerund "servicing" to partsmen and mechanics. But there is no cause for ignoring the literal reach of the statute, especially when any one-to-one matching of nouns and gerunds is foreclosed by the reality that the statute features three antecedent nouns but only two consequent gerunds. While the Ninth Circuit believed that "Congress trusted courts to recognize the obvious," Congress has not licensed courts to ignore the literal text of statutes. And what has been "obvious" to every other court to address the question is that the plain meaning of §213(b)(10)(A) encompasses service advisors.[14]

4. Last, the Ninth Circuit believed that the legislative history "strongly suggests" that §213(b)(10)(A) does not encompass service advisors. Pet.App.21 n.14; Pet.App.22-30. That is a curious determination given that, last time around, the Ninth Circuit deemed the legislative history "inconclusive." Pet.App.70. While the Ninth Circuit had it right the first time, the more salient point is that courts "do not resort to legislative history to cloud a statutory text that is clear." *Ratzlaf v. United States*, 510 U.S. 135, 147-48 (1994). As this Court has repeatedly observed, the process of statutory construction not only "begins with the statutory text," but "ends there as well if the text is unambiguous." *BedRoc Ltd. v. United States*, 541 U.S. 176, 183 (2004).

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[14] The Ninth Circuit characterized its noun-gerund analysis as an exercise in "holistic" interpretation. Pet.App.16. But when this Court has referred to the "holistic endeavor" of statutory construction, it has meant looking to "the remainder of the statutory scheme" to clarify a provision's meaning—because, for example, "the same terminology is used elsewhere in a context that makes its meaning clear," or "one of the permissible meanings produces a substantive effect that is compatible with the rest of the law." *United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 371 (1988); *see, e.g.*, *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552, 2563 (2013); *Smith v. United States*, 508 U.S. 223, 233-34 (1993). The Ninth Circuit engaged in no such analysis; it simply (mis)interpreted §213(b)(10)(A) in isolation. A proper "holistic" reading would have taken into account other provisions in the FLSA, like §207(*i*) and §213(a)(1), that demonstrate why treating service advisors as exempt comports with the broader structure and purpose of the FLSA. *See* pp. 32-34, *supra*.

In all events, the legislative history invoked by the Ninth Circuit provides no support for finding service advisors non-exempt. Even the Ninth Circuit was forced to admit that the legislative record contains "only one probative discussion by members of Congress." Pet.App.23 (citing 112 Cong. Rec. 20,502-06 (1966)). In fact, that one discussion did not address service advisors at all, but was a Senate debate about whether to exempt partsmen in addition to automobile salesmen and mechanics. Without any discussion of service advisors, the snippet's probative value to the question at hand is nil. Moreover, as to partsmen, the Ninth Circuit's invocation of the legislative history is an object lesson in the dangers of resorting to legislative history when the text is clear. The statutory text leaves no doubt about the status of partsmen—they are plainly exempt. But the Ninth Circuit resorted to legislative history on the same subject to support an atextual reading of the statute that would engender doubt about whether partsmen are exempt if they do not actually or personally service automobiles.

The Ninth Circuit ultimately acknowledged the "legislative history's apparent silence" regarding service advisors, but it then attempted to leverage that silence, and its contrast with the explicit discussion of automobile salesmen, to support its deviation from the literal text. Pet.App.26. This Court is wary enough about drawing inferences from the absence of statutory text. *See, e.g.*, *Burns v. United States*, 501 U.S. 129, 136 (1991). Drawing inferences from gaps in the *legislative history* when the text is broad and clear is plainly a bridge too far. "An inference drawn from congressional silence certainly cannot be credited when it is contrary to all other textual and contextual evidence of congressional intent." *Id.*

The acknowledged silence in the contemporary legislative history prompted the Ninth Circuit to invoke legislative history regarding the 1974 amendments to the FLSA to draw inferences about Congress' intent when it enacted the exemption in 1966. This post-enactment legislative history, better characterized as "legislative future," *United States ex rel. Long v. SCS Bus. & Tech. Inst.*, 173 F.3d 870, 878-79 (D.C. Cir. 1999) (Silberman, J.), is a remarkably poor indicator of congressional intent *at the time Congress initially acted*. "Post-enactment legislative history (a contradiction in terms) is not a legitimate tool of statutory interpretation." *Bruesewitz v. Wyeth LLC*, 562 U.S. 223, 242 (2011). In all events, the materials the Ninth Circuit uncovered do not even illuminate Congress' thinking in 1974. The best the Ninth Circuit could point to were several sentences in two "written summaries of the revised exemption" prepared by two legislators (or, more likely, their staff). Pet.App.26-27; *see Exxon Mobil Corp. v. Allapattah Servs.*, 545 U.S. 546, 568-69 (2005) (noting that "legislative materials like committee reports, which are not themselves subject to the requirements of Article I," may be authored by "unrepresentative committee members—or, worse yet, unelected staffers and lobbyists").

Making matters worse, the Ninth Circuit invoked statements from *non-members of Congress*. Pet.App.22-23, 28-29. Those statements, made by witnesses at subcommittee hearings, shed no light on what Congress actually intended or enacted. Worse still, the Ninth Circuit invoked witness statements from hearings that *did not even result in legislation*. *See* Pet.App.25-26 n.18 (citing witness testimony from 1957, 1958, 1959, and 1960). Plumbing the depths of witness statements when the Members are silent—and in years when Members do not even enact legislation—is truly "an exercise in 'looking over a crowd and picking out your friends.'" *Exxon Mobil*, 545 U.S. at 568. That the Ninth Circuit was "[d]riven to th[is] last ditch," *Fidelity Fin. Servs., Inc. v. Fink*, 522 U.S. 211, 218 (1998), underscores that the legislative history is indeed "inconclusive" and confirms that this Court should reject the Ninth Circuit's effort to use "ambiguous legislative history to muddy clear statutory language," *Milner v. Dep't of Navy*, 562 U.S. 562, 572 (2011).

B. FLSA Exemptions Should Be Interpreted Fairly and Correctly, Not Narrowly or Broadly.

The Ninth Circuit buttressed its untenable construction of the statutory text by relying on the purported "rule that the exemptions in §213 of the FLSA 'are to be narrowly construed against the employers seeking to assert them.'" Pet.App.20 (quoting *Arnold v. Ben Kanowsky, Inc.*, 361 U.S. 388, 392 (1960)); *see also* Pet.App.21. While the Ninth Circuit suggested that it would have reached the same conclusion even without that so-called "rule," Pet.App.21 n.14, its invocation of that interpretive crutch to deviate from the literal text underscores the weakness of its reasoning and the danger posed by this misguided rule.

In recent years, the Court has cited this anti-employer "canon" of interpreting the FLSA only in the course of declining to apply it. *See, e.g.*, *Sandifer v. U.S. Steel Corp.*, 134 S. Ct. 870, 879 n.7 (2014) (reserving question of whether Court should "disapprove" anti-employer canon); *Christopher*, 567 U.S. at 164 n.21 (canon does not apply to FLSA's definitions in §203). It has been at least several decades, if not longer, since the Court has actually invoked this principle as even a partial basis for its construction of the FLSA.

That should come as no surprise. In interpreting a statute, a court's goal "should be neither liberally to expand nor strictly to constrict [the statute's] meaning, but rather to get the meaning precisely right." Antonin Scalia, *Assorted Canards of Contemporary Legal Analysis*, 40 Case W. Res. L. Rev. 581, 582 (1990). Applying the purported canon of broad construction of the FLSA (or narrow construction of the FLSA's exemptions), however, inevitably leads courts to subordinate that principal concern. Indeed, this supposed "rule" is just an FLSA-specific variant of the disfavored notion that courts should interpret remedial statutes broadly—a notion this Court has rightly dubbed "that last redoubt of losing causes." *OWCP v. Newport News Shipbuilding & Dry Dock Co.*, 514 U.S. 122, 135-36 (1995).

Even though this Court has largely disregarded the anti-employer canon, a number of lower courts—including the Ninth Circuit here—have seized upon outdated dicta from this Court and used it to interpret the FLSA in ways that tip the scales in favor of employees claiming to be covered by the statute. *See*

Pet.App.21 (agreeing that "literal" reading of statute exempts service advisors, but finding service advisors non-exempt because of "the rule that we must interpret exemptions narrowly"); *see also, e.g.*, *Morrison v. Cty. of Fairfax*, 826 F.3d 758, 761, 768 (4th Cir. 2016); *Lawrence v. City of Philadelphia*, 527 F.3d 299, 310 (3d Cir. 2008); *Miller v. Team Go Figure*, No. 3:13-CV-1509-O, 2014 WL 1909354, at *7 (N.D. Tex. May 13, 2014); *Amendola v. Bristol-Myers Squibb Co.*, 558 F. Supp. 2d 459, 472 (S.D.N.Y. 2008). While the plain text of §213(b)(10)(A) clearly encompasses service advisors, such that a balance-tipping canon would not benefit Respondents here in any event, the Court should nevertheless take this opportunity to make clear to lower courts that this "last redoubt of losing causes" is no substitute for careful statutory interpretation. Having bedeviled the legal profession for decades and having led numerous lower courts astray, the time has come to formally inter the anti-employer canon. The FLSA and its exemptions should be construed neither narrowly nor broadly, but fairly and correctly.[15]

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[15] The Ninth Circuit acknowledged that this Court has recently declined to employ the canon in FLSA decisions, but it distinguished those decisions because they did not involve §213 exemptions. Pet.App.20. But whether one is interpreting a statutory definition in §203 (as in *Sandifer* and *Christopher*) or a statutory exemption in §213 (as here), applying an anti-employer canon of construction produces the same result: an "exemption from ... humanitarian and remedial legislation," to quote an early case announcing the canon. *A.H. Phillips, Inc. v. Walling*, 324 U.S. 490, 493 (1945). Whatever the category of statutory provision, there is no basis for interpreting the statutory text more or less broadly than customary and appropriate canons of construction permit.

C. If Allowed to Stand, the Ninth Circuit's Erroneous Decision Will Produce Far-Reaching Consequences for Both Dealerships and Service Advisors.

As this Court recognized in *Encino I*, affirming the decision below would disrupt decades of settled expectations and open employers to substantial retroactive liability, something this Court has been loath to do in the FLSA context. The Ninth Circuit's decision has the potential to cause serious harm to automobile dealerships and service advisors alike, without any countervailing benefits in terms of the FLSA's goals. Remarkably, however, the Ninth Circuit did not even address these far-reaching consequences in the decision below—even though this Court repeatedly acknowledged them in *Encino I* and even though they are obvious in light of nearly four decades of agency acquiescence in the courts' heretofore uniform conclusion that service advisors are exempt from the FLSA's overtime requirements. *See Encino I*, 136 S. Ct. at 2126-27 (noting the "serious reliance interests at stake"); *id.* at 2126 (noting "decades of industry reliance on the Department's prior policy"); *id.* (observing that "[d]ealerships and service advisors negotiated and structured their compensation plans against this background understanding").

The scope of the FLSA exemption under §213(b)(10)(A) is of tremendous practical significance to the automobile industry nationwide. The nation's 18,000 franchised car and truck dealerships employ an estimated 100,000 service advisors. NADA Cert. Amicus Br. at 5-6. Based on decades of settled precedent treating those employees as exempt and agency guidance to the same effect, many dealerships have offered compensation packages based primarily on sales commissions rather than hourly wages. Yet the Ninth Circuit has now concluded that those longstanding compensation arrangements have been unlawful from the start.

This Court has not looked favorably upon attempts by plaintiffs to use novel theories of FLSA liability to upset long-settled industry practices. As the Court has explained, it may be "possible for an entire industry to be in violation of the [FLSA] for a long time" with no one noticing, but the "more plausible hypothesis" is that the industry's practices simply were not unlawful. *Christopher*, 567 U.S. at 158 (quoting *Yi v. Sterling Collision Ctrs.*, 480 F.3d 505, 510-11 (7th Cir. 2007)). The Court has thus repeatedly rejected FLSA claims that would have exposed settled industry practices to potentially significant retroactive liability (including back pay and double damages). *See, e.g.*, *id.* at 157 (rejecting FLSA liability for pharmaceutical sales representatives where "the pharmaceutical industry had little reason to suspect that its longstanding practice of treating [sales representatives] as exempt ... transgressed the FLSA"); *Integrity Staffing*, 135 S. Ct. at 518-19 (rejecting novel attempt to impose FLSA liability for time spent in security screenings); *see also Yi*, 480 F.3d at 510 (rejecting FLSA challenge to a "system of compensation [that] is industry-wide, and of long standing").

Those reliance concerns are at their zenith in cases like this and *Christopher*, where plaintiffs seek to have employees who were actually paid on a commission basis retroactively reclassified as non-exempt employees. Not only were workers focused on earning commissions, rather than working a set number of hours, but employers did not have an incentive to strictly track the number of hours worked, which creates both evidentiary difficulties and the prospect of wholly unjustified windfalls. *See Christopher*, 567 U.S. at 166 (sales work was "difficult to standardize to any time frame," which "ma[de] compliance with the overtime provisions difficult"). This problem is evident in Respondents' admission that their hours were not tracked or recorded, J.A.56-57, and in their studious ambiguity concerning the damages they seek. Having received commissions based on their sales, they are in no position to ask for 150% of those commissions, but any effort to attribute a different type of compensation to previously commissioned salespeople is artificial. And moving forward, the Ninth Circuit's holding would force both service advisors and dealerships into compensation plans other than the ones they had voluntarily accepted, to the detriment of employers and employees alike.

The problems with allowing Respondents to reap such windfalls are exacerbated by the differential treatment implicit in the Ninth Circuit's interpretation of the exemption. Under the approach adopted by every other court to consider the issue, the vast majority of salespeople and all three core components of the service team at a dealership are treated the same, *viz.*, as exempt. The Ninth Circuit's decision, however, would grant service advisors, but not partsmen or mechanics, a huge windfall. Those windfalls cannot help but prove to be divisive, especially because service advisors are already compensated better on average than partsmen and mechanics. *See* Nat'l Auto. Dealers Ass'n, *2016 Dealership Workforce Study: Automotive Retail National & Regional Trends in Compensation, Benefits & Retention* 11 (2016), http://bit.ly/2zSedFA (service advisors' average compensation almost 30% higher than partsmen's). Thus, dealers would face the prospect of not only having to pay out damages retrospectively, but also having to deal with anomalous divisions among their core service employees going forward.

* * *

Treating service advisors as non-exempt would do nothing to advance the purposes of the FLSA. It would, however, impose significant and unnecessary burdens and costs on dealerships and service advisors alike. The Ninth Circuit's novel and unprecedented interpretation of §213(b)(10)(A) works a fundamental, unnecessary, and unauthorized change in the law. It should be reversed.

CONCLUSION

This Court should reverse the judgment of the Ninth Circuit.

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November 1, 2017

STATUTORY APPENDIX

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29 U.S.C. § 213
EXEMPTIONS

(a) Minimum wage and maximum hour requirements

The provisions of sections 206 (except subsection (d) in the case of paragraph (1) of this subsection) and 207 of this title shall not apply with respect to—

(1) any employee employed in a bona fide executive, administrative, or professional capacity (including any employee employed in the capacity of academic administrative personnel or teacher in elementary or secondary schools), or in the capacity of outside salesman (as such terms are defined and delimited from time to time by regulations of the Secretary, subject to the provisions of subchapter II of chapter 5 of title 5, except that an employee of a retail or service establishment shall not be excluded from the definition of employee employed in a bona fide executive or administrative capacity because of the number of hours in his workweek which he devotes to activities not directly or closely related to the performance of executive or administrative activities, if less than 40 per centum of his hours worked in the workweek are devoted to such activities); or

(2) Repealed. Pub. L. 101-157, § 3(c)(1), Nov. 17, 1989, 103 Stat. 939.

(3) any employee employed by an establishment which is an amusement or recreational establishment, organized camp, or religious or non-profit educational conference center, if (A) it does not operate for more than

seven months in any calendar year, or (B) during the preceding calendar year, its average receipts for any six months of such year were not more than 331/3 per centum of its average receipts for the other six months of such year, except that the exemption from sections 206 and 207 of this title provided by this paragraph does not apply with respect to any employee of a private entity engaged in providing services or facilities (other than, in the case of the exemption from section 206 of this title, a private entity engaged in providing services and facilities directly related to skiing) in a national park or a national forest, or on land in the National Wildlife Refuge System, under a contract with the Secretary of the Interior or the Secretary of Agriculture; or

(4) Repealed. Pub. L. 101-157, § 3(c)(1), Nov. 17, 1989, 103 Stat. 939.

(5) any employee employed in the catching, taking, propagating, harvesting, cultivating, or farming of any kind of fish, shellfish, crustacea, sponges, seaweeds, or other aquatic forms of animal and vegetable life, or in the first processing, canning or packing such marine products at sea as an incident to, or in conjunction with, such fishing operations, including the going to and returning from work and loading and unloading when performed by any such employee; or

(6) any employee employed in agriculture (A) if such employee is employed by an employer who did not, during any calendar quarter during the preceding calendar year, use more than five

hundred man-days of agricultural labor, (B) if such employee is the parent, spouse, child, or other member of his employer's immediate family, (C) if such employee (i) is employed as a hand harvest laborer and is paid on a piece rate basis in an operation which has been, and is customarily and generally recognized as having been, paid on a piece rate basis in the region of employment, (ii) commutes daily from his permanent residence to the farm on which he is so employed, and (iii) has been employed in agriculture less than thirteen weeks during the preceding calendar year, (D) if such employee (other than an employee described in clause (C) of this subsection) (i) is sixteen years of age or under and is employed as a hand harvest laborer, is paid on a piece rate basis in an operation which has been, and is customarily and generally recognized as having been, paid on a piece rate basis in the region of employment, (ii) is employed on the same farm as his parent or person standing in the place of his parent, and (iii) is paid at the same piece rate as employees over age sixteen are paid on the same farm, or (E) if such employee is principally engaged in the range production of livestock; or

(7) any employee to the extent that such employee is exempted by regulations, order, or certificate of the Secretary issued under section 214 of this title; or

(8) any employee employed in connection with the publication of any weekly, semiweekly, or daily newspaper with a circulation of less than

four thousand the major part of which circulation is within the county where published or counties contiguous thereto; or

(9) Repealed. Pub. L. 93-259, § 23(a)(1), Apr. 8, 1974, 88 Stat. 69.

(10) any switchboard operator employed by an independently owned public telephone company which has not more than seven hundred and fifty stations; or

(11) Repealed. Pub. L. 93-259, § 10(a), Apr. 8, 1974, 88 Stat. 63.

(12) any employee employed as a seaman on a vessel other than an American vessel; or

(13), (14) Repealed. Pub. L. 93-259, §§ 9(b)(1), 23(b)(1), Apr. 8, 1974, 88 Stat. 63, 69.

(15) any employee employed on a casual basis in domestic service employment to provide babysitting services or any employee employed in domestic service employment to provide companionship services for individuals who (because of age or infirmity) are unable to care for themselves (as such terms are defined and delimited by regulations of the Secretary); or

(16) a criminal investigator who is paid availability pay under section 5545a of title 5; or

(17) any employee who is a computer systems analyst, computer programmer, software engineer, or other similarly skilled worker, whose primary duty is—

(A) the application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software, or system functional specifications;

(B) the design, development, documentation, analysis, creation, testing, or modification of computer systems or programs, including prototypes, based on and related to user or system design specifications;

(C) the design, documentation, testing, creation, or modification of computer programs related to machine operating systems; or

(D) a combination of duties described in subparagraphs (A), (B), and (C) the performance of which requires the same level of skills, and

who, in the case of an employee who is compensated on an hourly basis, is compensated at a rate of not less than $27.63 an hour.

(b) Maximum hour requirements

The provisions of section 207 of this title shall not apply with respect to—

(1) any employee with respect to whom the Secretary of Transportation has power to establish qualifications and maximum hours of service pursuant to the provisions of section 31502 of title 49; or

(2) any employee of an employer engaged in the operation of a rail carrier subject to part A of subtitle IV of title 49; or

(3) any employee of a carrier by air subject to the provisions of title II of the Railway Labor Act [45 U.S.C. 181 et seq.]; or

(4) Repealed. Pub. L. 93-259, § 11(c), Apr. 8, 1974, 88 Stat. 64.

(5) any individual employed as an outside buyer of poultry, eggs, cream, or milk, in their raw or natural state; or

(6) any employee employed as a seaman; or

(7) Repealed. Pub. L. 93-259, § 21(b)(3), Apr. 8, 1974, 88 Stat. 68.

(8) Repealed. Pub. L. 95-151, § 14(b), Nov. 1, 1977, 91 Stat. 1252.

(9) any employee employed as an announcer, news editor, or chief engineer by a radio or television station the major studio of which is located (A) in a city or town of one hundred thousand population or less, according to the latest available decennial census figures as compiled by the Bureau of the Census, except where such city or town is part of a standard metropolitan statistical area, as defined and designated by the Office of Management and Budget, which has a total population in excess of one hundred thousand, or (B) in a city or town of twenty-five thousand population or less, which is part of such an area but is at least 40 airline miles from the principal city in such area; or

(10)(A) any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles, trucks, or farm implements, if he is employed by a nonmanufacturing establishment primarily engaged in the business of selling such vehicles or implements to ultimate purchasers; or

(B) any salesman primarily engaged in selling trailers, boats, or aircraft, if he is employed by a nonmanufacturing establishment primarily engaged in the business of selling trailers, boats, or aircraft to ultimate purchasers; or

(11) any employee employed as a driver or driver's helper making local deliveries, who is compensated for such employment on the basis of trip rates, or other delivery payment plan, if the Secretary shall find that such plan has the general purpose and effect of reducing hours worked by such employees to, or below, the maximum workweek applicable to them under section 207(a) of this title; or

(12) any employee employed in agriculture or in connection with the operation or maintenance of ditches, canals, reservoirs, or waterways, not owned or operated for profit, or operated on a sharecrop basis, and which are used exclusively for supply and storing of water, at least 90 percent of which was ultimately delivered for agricultural purposes during the preceding calendar year; or

(13) any employee with respect to his employment in agriculture by a farmer, notwithstanding other employment of such employee in connection with livestock auction operations in which such farmer is engaged as an adjunct to the raising of livestock, either on his own account or in conjunction with other farmers, if such employee (A) is primarily employed during

his workweek in agriculture by such farmer, and (B) is paid for his employment in connection with such livestock auction operations at a wage rate not less than that prescribed by section 206(a)(1) of this title; or

(14) any employee employed within the area of production (as defined by the Secretary) by an establishment commonly recognized as a country elevator, including such an establishment which sells products and services used in the operation of a farm, if no more than five employees are employed in the establishment in such operations; or

(15) any employee engaged in the processing of maple sap into sugar (other than refined sugar) or syrup; or

(16) any employee engaged (A) in the transportation and preparation for transportation of fruits or vegetables, whether or not performed by the farmer, from the farm to a place of first processing or first marketing within the same State, or (B) in transportation, whether or not performed by the farmer, between the farm and any point within the same State of persons employed or to be employed in the harvesting of fruits or vegetables; or

(17) any driver employed by an employer engaged in the business of operating taxicabs; or

(18), (19) Repealed. Pub. L. 93-259, §§ 15(c), 16(b), Apr. 8, 1974, 88 Stat. 65.

(20) any employee of a public agency who in any workweek is employed in fire protection

activities or any employee of a public agency who in any workweek is employed in law enforcement activities (including security personnel in correctional institutions), if the public agency employs during the workweek less than 5 employees in fire protection or law enforcement activities, as the case may be; or

(21) any employee who is employed in domestic service in a household and who resides in such household; or

(22) Repealed. Pub. L. 95-151, § 5, Nov. 1, 1977, 91 Stat. 1249.

(23) Repealed. Pub. L. 93-259, § 10(b)(3), Apr. 8, 1974, 88 Stat. 64.

(24) any employee who is employed with his spouse by a nonprofit educational institution to serve as the parents of children—

> (A) who are orphans or one of whose natural parents is deceased, or
>
> (B) who are enrolled in such institution and reside in residential facilities of the institution,

while such children are in residence at such institution, if such employee and his spouse reside in such facilities, receive, without cost, board and lodging from such institution, and are together compensated, on a cash basis, at an annual rate of not less than $10,000; or

(25), (26) Repealed. Pub. L. 95-151, §§ 6(a), 7(a), Nov. 1, 1977, 91 Stat. 1249, 1250.

(27) any employee employed by an establishment which is a motion picture theater; or

(28) any employee employed in planting or tending trees, cruising, surveying, or felling timber, or in preparing or transporting logs or other forestry products to the mill, processing plant, railroad, or other transportation terminal, if the number of employees employed by his employer in such forestry or lumbering operations does not exceed eight;

(29) any employee of an amusement or recreational establishment located in a national park or national forest or on land in the National Wildlife Refuge System if such employee (A) is an employee of a private entity engaged in providing services or facilities in a national park or national forest, or on land in the National Wildlife Refuge System, under a contract with the Secretary of the Interior or the Secretary of Agriculture, and (B) receives compensation for employment in excess of fifty-six hours in any workweek at a rate not less than one and one-half times the regular rate at which he is employed; or

(30) a criminal investigator who is paid availability pay under section 5545a of title 5.

(c) Child labor requirements

(1) Except as provided in paragraph (2) or (4), the provisions of section 212 of this title relating to child labor shall not apply to any employee employed in agriculture outside of school hours for the school district where such employee is living while he is so employed, if such employee—

(A) is less than twelve years of age and (i) is employed by his parent, or by a person standing in the place of his parent, on a farm owned or operated by such parent or person, or (ii) is employed, with the consent of his parent or person standing in the place of his parent, on a farm, none of the employees of which are (because of subsection (a)(6)(A) of this section) required to be paid at the wage rate prescribed by section 206(a)(5) of this title,

(B) is twelve years or thirteen years of age and (i) such employment is with the consent of his parent or person standing in the place of his parent, or (ii) his parent or such person is employed on the same farm as such employee, or

(C) is fourteen years of age or older.

(2) The provisions of section 212 of this title relating to child labor shall apply to an employee below the age of sixteen employed in agriculture in an occupation that the Secretary of Labor finds and declares to be particularly hazardous for the employment of children below the age of sixteen, except where such employee is employed by his parent or by a person standing in the place of his parent on a farm owned or operated by such parent or person.

(3) The provisions of section 212 of this title relating to child labor shall not apply to any child employed as an actor or performer in motion pictures or theatrical productions, or in radio or television productions.

(4)(A) An employer or group of employers may apply to the Secretary for a waiver of the application of section 212 of this title to the employment for not more than eight weeks in any calendar year of individuals who are less than twelve years of age, but not less than ten years of age, as hand harvest laborers in an agricultural operation which has been, and is customarily and generally recognized as being, paid on a piece rate basis in the region in which such individuals would be employed. The Secretary may not grant such a waiver unless he finds, based on objective data submitted by the applicant, that—

(i) the crop to be harvested is one with a particularly short harvesting season and the application of section 212 of this title would cause severe economic disruption in the industry of the employer or group of employers applying for the waiver;

(ii) the employment of the individuals to whom the waiver would apply would not be deleterious to their health or well-being;

(iii) the level and type of pesticides and other chemicals used would not have an adverse effect on the health or well-being of the individuals to whom the waiver would apply;

(iv) individuals age twelve and above are not available for such employment; and

(v) the industry of such employer or group of employers has traditionally and substantially employed individuals under twelve years of age without displacing substantial job opportunities for individuals over sixteen years of age.

(B) Any waiver granted by the Secretary under subparagraph (A) shall require that—

(i) the individuals employed under such waiver be employed outside of school hours for the school district where they are living while so employed;

(ii) such individuals while so employed commute daily from their permanent residence to the farm on which they are so employed; and

(iii) such individuals be employed under such waiver (I) for not more than eight weeks between June 1 and October 15 of any calendar year, and (II) in accordance with such other terms and conditions as the Secretary shall prescribe for such individuals' protection.

(5)(A) In the administration and enforcement of the child labor provisions of this chapter, employees who are 16 and 17 years of age shall be permitted to load materials into, but not operate or unload materials from, scrap paper balers and paper box compactors—

(i) that are safe for 16- and 17-year-old employees loading the scrap paper balers or paper box compactors; and

(ii) that cannot be operated while being loaded.

(B) For purposes of subparagraph (A), scrap paper balers and paper box compactors shall be considered safe for 16- or 17-year-old employees to load only if—

(i)(I) the scrap paper balers and paper box compactors meet the American National Standards Institute's Standard ANSI Z245.5-1990 for scrap paper balers and Standard ANSI Z245.2-1992 for paper box compactors; or

(II) the scrap paper balers and paper box compactors meet an applicable standard that is adopted by the American National Standards Institute after August 6, 1996, and that is certified by the Secretary to be at least as protective of the safety of minors as the standard described in subclause (I);

(ii) the scrap paper balers and paper box compactors include an on-off switch incorporating a key-lock or other system and the control of the system is maintained in the custody of employees who are 18 years of age or older;

(iii) the on-off switch of the scrap paper balers and paper box compactors is maintained in an off position when the scrap paper balers and paper box compactors are not in operation; and

(iv) the employer of 16- and 17-year-old employees provides notice, and posts a notice, on the scrap paper balers and paper box compactors stating that—

(I) the scrap paper balers and paper box compactors meet the applicable standard described in clause (i);

(II) 16- and 17-year-old employees may only load the scrap paper balers and paper box compactors; and

(III) any employee under the age of 18 may not operate or unload the scrap paper balers and paper box compactors.

The Secretary shall publish in the Federal Register a standard that is adopted by the American National Standards Institute for scrap paper balers or paper box compactors and certified by the Secretary to be protective of the safety of minors under clause (i)(II).

(C)(i) Employers shall prepare and submit to the Secretary reports—

(I) on any injury to an employee under the age of 18 that requires medical treatment (other than first aid) resulting from the employee's contact with a scrap paper baler or paper box compactor during the loading, operation, or unloading of the baler or compactor; and

(II) on any fatality of an employee under the age of 18 resulting from the employee's contact with a scrap paper baler or paper box compactor during the loading, operation, or unloading of the baler or compactor.

(ii) The reports described in clause (i) shall be used by the Secretary to determine whether or not the implementation of subparagraph (A) has had any effect on the safety of children.

(iii) The reports described in clause (i) shall provide—

(I) the name, telephone number, and address of the employer and the address of the place of employment where the incident occurred;

(II) the name, telephone number, and address of the employee who suffered an injury or death as a result of the incident;

(III) the date of the incident;

(IV) a description of the injury and a narrative describing how the incident occurred; and

(V) the name of the manufacturer and the model number of the scrap paper baler or paper box compactor involved in the incident.

(iv) The reports described in clause (i) shall be submitted to the Secretary promptly, but not later than 10 days after the date on which an incident relating to an injury or death occurred.

(v) The Secretary may not rely solely on the reports described in clause (i) as the basis for making a determination that any of the employers described in clause (i) has violated a provision of section 212 of this title relating to oppressive child labor or a regulation or order issued pursuant to section 212 of this title. The Secretary shall, prior to making such a determination, conduct an investigation and inspection in accordance with section 212(b) of this title.

(vi) The reporting requirements of this subparagraph shall expire 2 years after August 6, 1996.

(6) In the administration and enforcement of the child labor provisions of this chapter, employees who are under 17 years of age may not drive automobiles or trucks on public roadways. Employees who are 17 years of age may drive automobiles or trucks on public roadways only if—

(A) such driving is restricted to daylight hours;

(B) the employee holds a State license valid for the type of driving involved in the job performed and has no records of any moving violation at the time of hire;

(C) the employee has successfully completed a State approved driver education course;

(D) the automobile or truck is equipped with a seat belt for the driver and any passengers and the employee's employer has instructed the employee that the seat belts must be used when driving the automobile or truck;

(E) the automobile or truck does not exceed 6,000 pounds of gross vehicle weight;

(F) such driving does not involve—

(i) the towing of vehicles;

(ii) route deliveries or route sales;

(iii) the transportation for hire of property, goods, or passengers;

(iv) urgent, time-sensitive deliveries;

(v) more than two trips away from the primary place of employment in any single day for the purpose of delivering goods of the employee's employer to a customer (other than urgent, time-sensitive deliveries);

(vi) more than two trips away from the primary place of employment in any single day for the purpose of transporting passengers (other than employees of the employer);

(vii) transporting more than three passengers (including employees of the employer); or

(viii) driving beyond a 30 mile radius from the employee's place of employment; and

(G) such driving is only occasional and incidental to the employee's employment.

For purposes of subparagraph (G), the term "occasional and incidental" is no more than one-third of an employee's worktime in any workday and no more than 20 percent of an employee's worktime in any workweek.

(7)(A)(i) Subject to subparagraph (B), in the administration and enforcement of the child labor provisions of this chapter, it shall not be considered oppressive child labor for a new entrant into the workforce to be employed inside or outside places of business where machinery is used to process wood products.

(ii) In this paragraph, the term "new entrant into the workforce" means an individual who—

(I) is under the age of 18 and at least the age of 14, and

(II) by statute or judicial order is exempt from compulsory school attendance beyond the eighth grade.

(B) The employment of a new entrant into the workforce under subparagraph (A) shall be permitted—

(i) if the entrant is supervised by an adult relative of the entrant or is supervised by an adult member of the same religious sect or division as the entrant;

(ii) if the entrant does not operate or assist in the operation of power-driven woodworking machines;

(iii) if the entrant is protected from wood particles or other flying debris within the workplace by a barrier appropriate to the potential hazard of such wood particles or flying debris or by maintaining a sufficient distance from machinery in operation; and

(iv) if the entrant is required to use personal protective equipment to prevent exposure to excessive levels of noise and saw dust.

(d) Delivery of newspapers and wreathmaking

The provisions of sections 206, 207, and 212 of this title shall not apply with respect to any employee engaged in the delivery of newspapers to the consumer or to any homeworker engaged in the making of wreaths composed principally of natural holly, pine, cedar, or other evergreens (including the harvesting of the evergreens or other forest products used in making such wreaths).

(e) Maximum hour requirements and minimum wage employees

The provisions of section 207 of this title shall not apply with respect to employees for whom the Secretary of Labor is authorized to establish minimum wage rates as provided in section 206(a)(3) of this title, except with respect to employees for whom such rates are in effect; and with respect to such employees the Secretary may make rules and regulations providing reasonable limitations and allowing reasonable variations, tolerances, and exemptions to and from any or all of the provisions of section 207 of this title if he shall find, after a public hearing on the matter, and taking into account the factors set forth in section 206(a)(3) of this title, that economic conditions warrant such action.

(f) Employment in foreign countries and certain United States territories

The provisions of sections 206, 207, 211, and 212 of this title shall not apply with respect to any employee whose services during the workweek are performed in a workplace within a foreign country or within territory under the jurisdiction of the United States other than the following: a State of the United States; the District of Columbia; Puerto Rico; the Virgin Islands; outer Continental Shelf lands defined in the Outer Continental Shelf Lands Act (ch. 345, 67 Stat. 462) [43 U.S.C. 1331 et seq.]; American Samoa; Guam; Wake Island; Eniwetok Atoll; Kwajalein Atoll; and Johnston Island.

(g) Certain employment in retail or service establishments, agriculture

The exemption from section 206 of this title provided by paragraph (6) of subsection (a) of this section shall not apply with respect to any employee employed by an establishment (1) which controls, is controlled by, or is under common control with, another establishment the activities of which are not related for a common business purpose to, but materially support the activities of the establishment employing such employee; and (2) whose annual gross volume of sales made or business done, when combined with the annual gross volume of sales made or business done by each establishment which controls, is controlled by, or is under common control with, the establishment employing such employee, exceeds $10,000,000 (exclusive of excise taxes at the retail level which are separately stated).

(h) Maximum hour requirement: fourteen workweek limitation

The provisions of section 207 of this title shall not apply for a period or periods of not more than fourteen workweeks in the aggregate in any calendar year to any employee who—

(1) is employed by such employer—

(A) exclusively to provide services necessary and incidental to the ginning of cotton in an establishment primarily engaged in the ginning of cotton;

(B) exclusively to provide services necessary and incidental to the receiving, handling, and storing of raw cotton and the compressing of raw cotton when performed at a cotton warehouse or compress-warehouse facility, other than one operated in conjunction with a cotton mill, primarily engaged in storing and compressing;

(C) exclusively to provide services necessary and incidental to the receiving, handling, storing, and processing of cottonseed in an establishment primarily engaged in the receiving, handling, storing, and processing of cottonseed; or

(D) exclusively to provide services necessary and incidental to the processing of sugar cane or sugar beets in an establishment primarily engaged in the processing of sugar cane or sugar beets; and

(2) receives for—

(A) such employment by such employer which is in excess of ten hours in any workday, and

(B) such employment by such employer which is in excess of forty-eight hours in any workweek,

compensation at a rate not less than one and one-half times the regular rate at which he is employed.

Any employer who receives an exemption under this subsection shall not be eligible for any other exemption under this section or section 207 of this title.

(i) Cotton ginning

The provisions of section 207 of this title shall not apply for a period or periods of not more than fourteen workweeks in the aggregate in any period of fifty-two consecutive weeks to any employee who—

(1) is engaged in the ginning of cotton for market in any place of employment located in a county where cotton is grown in commercial quantities; and

(2) receives for any such employment during such workweeks—

(A) in excess of ten hours in any workday, and

(B) in excess of forty-eight hours in any workweek,

compensation at a rate not less than one and one-half times the regular rate at which he is employed. No week included in any fifty-two week period for purposes of the preceding sentence may be included for such purposes in any other fifty-two week period.

(j) Processing of sugar beets, sugar beet molasses, or sugar cane

The provisions of section 207 of this title shall not apply for a period or periods of not more than fourteen workweeks in the aggregate in any period of fifty-two consecutive weeks to any employee who—

(1) is engaged in the processing of sugar beets, sugar beet molasses, or sugar cane into sugar (other than refined sugar) or syrup; and

(2) receives for any such employment during such workweeks—

(A) in excess of ten hours in any workday, and

(B) in excess of forty-eight hours in any workweek,

compensation at a rate not less than one and one-half times the regular rate at which he is employed. No week included in any fifty-two week period for purposes of the preceding sentence may be included for such purposes in any other fifty-two week period.

No. 16–1362

In the Supreme Court of the United States

ENCINO MOTORCARS, LLC,
PETITIONER,

v.

HECTOR NAVARRO, MIKE SHIRINIAN, ANTHONY
PINKINS, KEVIN MALONE, AND REUBEN CASTRO,
RESPONDENTS.

*ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT*

BRIEF FOR RESPONDENTS

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QUESTION PRESENTED

Does the Fair Labor Standards Act's overtime-pay exemption for certain automobile dealership "salesm[e]n, partsm[e]n, or mechanic[s]," 29 U.S.C. § 213(b)(10)(A), also exempt service advisors from the statute's overtime protections?

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INTRODUCTION

The Fair Labor Standards Act of 1938 (FLSA) guarantees nonexempt employees time-and-a-half pay for hours worked beyond forty per week. 29 U.S.C. § 207(a)(1). From 1961 to 1966, all automobile dealership employees were exempt from overtime pay. In 1966, Congress repealed this blanket exemption and replaced it with one that (as amended again in 1974) was limited to a particular subset of three enumerated occupations: "any [1] salesman, [2] partsman, or [3] mechanic" who is "primarily engaged in selling or servicing automobiles, trucks, or farm implements." 29 U.S.C. § 213(b)(10)(A).

Service advisors advise customers and act as liaisons to mechanics, so they do not fit within the three statutory occupations. The statute therefore entitles them to overtime pay. Petitioner concedes that they do not "go under the hood to service cars," Br. 25, 30, but nonetheless seeks to shoehorn them in to the exemption by contriving the nonexistent (and inherently contradictory) category of "salesmen primarily engaged in servicing automobiles." Petitioner misreads "salesman" to include anyone who ever sells at all, "primarily" to sweep in service advisors' incidental or occasional duties, "engaged in" to mean performing tasks "integral to the process of servicing vehicles" or to the "servicing process" (Br. 13, 42), "servicing" to extend beyond manual labor, and "automobiles" to include automobile services.

Petitioner offers its textual analysis with hardly a dictionary definition (Br. 30) and its supposed "fundamental rule of grammar" (Br. 26–28) with nary a grammatical authority. Dictionaries, interpretive canons, Scalia & Garner, an opinion of this Court by Chief Justice John Marshall, and computer searches of millions of books are all to the contrary, not to mention more than a hundred analogously worded statutes that are appended to this brief. Dozens of dealership occupations are protected by the statute, and only three enumerated occupations are exempt. Expanding them to include a fourth would not only violate the statute's text and structure, but disrupt settled industry pay practices and ensnare courts in unnecessary further rounds of line-drawing.

STATEMENT

A. Statutory and Regulatory Background

1. The FLSA promotes a "'general maximum working week'" and combats "the evil of 'overwork' as well as 'underpay.'" *Overnight Motor Transp. Co.* v. *Missel*, 316 U.S. 572, 578 (1942) (quoting President Franklin Roosevelt). Thus, it generally requires employers to pay time-and-a-half for hours worked beyond forty per week. 29 U.S.C. § 207(a)(1). Congress exempted specific occupations from this overtime-pay mandate. *See id.* §§ 207, 213.

2. In 1961, Congress enacted a blanket exemption from the FLSA's minimum-wage and overtime provisions for "any employee of a retail or service establishment which is primarily engaged in the business of selling automobiles, trucks, or farm implements." Fair Labor Standards Amendments of 1961, Pub. L. No. 87-30, § 9, 75 Stat. 65, 73 (codified at 29 U.S.C. § 213(a)(19) (1964)). Thus, from 1961 to 1966, all automobile dealership employees were exempt from the overtime-pay requirement, whether they

were salesmen, receptionists, managers, accountants, mechanics, lube technicians, painters, car jockeys, towermen, car washers, detailers, partsmen, stockers, parts runners, service advisors, or janitors.

3. In 1966, Congress repealed the blanket dealership exemption from the minimum wage and narrowed it as to overtime pay. The Senate's floor discussion focused on the need for employees in three specific occupations—salesmen, partsmen, and mechanics—to work long and unpredictable hours, sometimes off-site. Senators emphasized that salesmen sold automobiles outside business hours, mechanics traveled for rural service calls, and farm-implement partsmen (the partsmen who were the focus of the congressional debate) had to respond to emergency calls for parts around the clock. 112 Cong. Rec. 20,502–04 (Aug. 24, 1966) (Sens. Bayh, Hruska, Mansfield, and Yarborough).

The 1966 statute thus exempted only those three occupations at automobile dealerships: "any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles, trailers, trucks, farm implements, or aircraft." Fair Labor Standards Amendments of 1966, Pub. L. No. 89-601, § 209, 80 Stat. 830, 836, *reprinted at* App., *infra*, A1.

4. In 1974, Congress revisited the exemption and enacted the current statutory text, amending the lists of subjects and objects and the gerunds that apply to each. Congress split the 1966 amendment into two subsections: one for "any salesman, partsman, or mechanic primarily engaged in *selling* or *servicing* automobiles, trucks, or farm implements," and the other for "any salesman primarily engaged in *selling*

trailers, boats, or aircraft." Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, § 14, 88 Stat. 55, 65 (emphases added), *reprinted at* App., *infra*, A2. The first subsection of the 1974 amendment, § 213(b)(10)(A), is the statutory text now under review.

5. In 1970, the Department of Labor (DOL) issued an interpretive rule clarifying that service advisors do not fall within the salesman /partsman/mechanic exemption, because they "are not themselves primarily engaged in the work of a salesman, partsman, or mechanic." 35 Fed. Reg. 5856, 5896 (Apr. 9, 1970) (codified at 29 C.F.R. § 779.372(c)(4) (1971)). But after several lower courts refused to defer to the 1970 interpretive rule, DOL issued nonbinding enforcement materials, declining for a time to enforce the FLSA's overtime provisions with respect to service advisors. Opp. 3–4.

In 2008, DOL issued a notice of proposed rulemaking to review the 1970 interpretive rule. 73 Fed. Reg. 43,654, 43,658–59, 43,671 (July 28, 2008). In 2011, after reviewing the comments it received, DOL issued a regulation that declined to broaden the statutory exemption to include service advisors. It explained that only "salesmen who sell vehicles and partsmen and mechanics who service vehicles" should be exempt, not service advisors. 76 Fed. Reg. 18,832, 18,838 (Apr. 5, 2011).

B. Facts and Procedural History

1. Respondents work (or worked) as service advisors for petitioner, a Mercedes-Benz automobile deal-

ership in the Los Angeles area. J.A. 54–56. Their job is to "meet and greet" customers, "accept cars for service," "suggest[] that certain services be conducted" based on "complaints given [to] them by the[] vehicle owners," and suggest "supplemental service." J.A. 54–55. After communicating with customers, they "write up an estimate for the repairs and services." J.A. 55. Porters then take automobiles back "to the mechanics . . . for repair and maintenance." *Id.*

During the dealership's regular business hours, the service advisors "are required to remain at their service posts" in the dealership's service department. J.A. 54. The dealership requires them to work from 7 a.m. to 6 p.m. at least five days per week, totaling a weekly minimum of fifty-five hours. J.A. 54. The employees are paid on commission and receive no overtime pay. J.A. 55–56.

2. In 2012, the service advisors filed suit in federal district court, alleging various violations of the FLSA and state law. Count One, at issue here, alleged that petitioner (the dealership) violated the FLSA by failing to pay them time-and-a-half for hours worked beyond forty per week. J.A. 57–59. The dealership moved to dismiss, arguing that service advisors are exempt from the FLSA's overtime protections under § 213(b)(10)(A). The district court acknowledged that "the statutory language of § 213(b)(10)(A) does not expressly exempt Service Advisors." Pet. App. 81. But, asserting that service advisors are "functionally equivalent to salesmen and mechanics," the district court extended the exemption to service advisors as well. Pet. App. 83. After dis-

missing the other FLSA claims, the court declined to exercise supplemental jurisdiction over the remaining state-law claims. Pet. App. 83–85.

3. The court of appeals unanimously reversed the dismissal of the FLSA overtime claim and supplemental state-law claims. Applying *Chevron* deference, the court upheld the agency's reading of the statutory text as reasonable. Pet. App. 73 (citing *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837, 844 (1984)). As the court explained, "[a] natural reading of the text strongly suggests that Congress did not intend that both verb clauses would apply to all three subjects." Pet. App. 69. "It is hard to imagine, in ordinary speech, [a] 'salesman . . . primarily engaged in . . . servicing automobiles.'" *Id.*

3. This Court granted certiorari, vacated, and remanded. Holding that DOL's bare explanation of its 2011 rule rendered it "procedurally defective," this Court did not reach the question presented here. Pet. App. 40. Instead of deciding the merits, this Court "remand[ed] for the Court of Appeals to interpret the statute in the first instance" without *Chevron* deference. Pet. App. 44–45.

Concurring, Justice Ginsburg (joined by Justice Sotomayor) suggested that service advisors, unlike partsmen, do not service automobiles. Pet. App. 46 n.1. The concurrence also "doubt[ed] that reliance interests would pose an insurmountable obstacle," noting other FLSA provisions that exempt certain commissioned employees and guard against retroactive liability. Pet. App. 47–48 n.2. Only the dissent would have held that "a service advisor is a 'salesman'" exempt from the FLSA's overtime-pay protections. Pet. App. 50–51, 54 (Thomas, J., joined by Alito, J., dissenting).

4. On remand, the court of appeals construed the exemption *de novo* and first established the "'ordinary, contemporary, common meaning' of the [statutory] term[s] at the time Congress added the relevant clause." Pet App. 8 (quoting *Perrin* v. *United States*, 444 U.S. 37, 42 (1979), and citing *Taniguchi* v. *Kan Pac. Saipan, Ltd.*, 566 U.S. 560, 566–68 (2012)). In sections A.1 and A.2 of its opinion, the court closely parsed the statutory phrases "any salesman, partsman, or mechanic" and "primarily engaged in selling or servicing automobiles." Pet. App. 8–16. The court held that "the most natural reading of the statute" does not exempt service advisors, and that the dealership's "interpretation represents a considerable stretch of the ordinary meaning of the statute's words." Pet. App. 8, 13. It further stated that its "interpretive task could end here, with the words of the statute as commonly understood" at the time. Pet. App. 16.

Only *after* establishing "the most natural reading of the statute" did the court refer to other "literal," *i.e.*, possible, interpretations of the statutory terms to confirm or disconfirm its reading. Pet. App. 8, 16; *see also id.* at 13 (quoting *Taniguchi*, 566 U.S. at 568 ("[T]he fact '[t]hat a definition is broad enough to encompass one sense of a word does not establish that the word is *ordinarily* understood in that sense") (emphasis in court of appeals' opinion)).

While noting that this Court's "longstanding" canon of construing § 213 exemptions narrowly provided additional support, the court explained that it "would [have] reach[ed] the same ultimate holding . . . even if the rule of narrow construction did not apply." Pet. App. 21 n.14. Likewise, the court referred to the legislative history only after interpreting the text and only as a further validation of its textual analysis. Pet. App. 16, 21. And while the court construed the statute *de novo*, in the alternative it would have deferred to DOL's "present reasoning [as] persuasive and thorough," under *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 140 (1944). Pet. App. 7 n.3.

SUMMARY OF ARGUMENT

The salesman/partsman/mechanic exemption exempts salesmen primarily engaged in selling automobiles and partsmen and mechanics primarily engaged in servicing automobiles. It does not exempt service advisors, who advise and consult, rather than selling or servicing automobiles. Indeed, petitioner itself concedes (Br. 30) that service advisors do not "go under the hood to service cars." Petitioner's effort (Br. 42) to expand the statutory terms to sweep in jobs "integral to the servicing process" would not only violate the statutory text, structure, history, and policies, but also scramble settled pay practices for dozens of occupations at dealerships.

I. The text of the statute ("any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles") does not exempt service advisors. A. Service advisors are not *salesmen*, but serve as liaisons between customers and mechanics. Congress chose to exempt three and only three specific occupations, even though service advisors were a recognized occupation at the time of enactment, of amendment, and now. Thus, the *expressio unius* canon forbids adding a fourth occupation or expanding "salesman" to embrace other occupations, as petitioner seeks to do.

B. Service advisors do not *service* automobiles because they do not perform automotive manual labor. Selling services is not the same as servicing. "*Engaged in*" means to involve oneself in or become employed in regularly; if anything, it narrows—rather than expands—the ordinary meaning of "servicing." And the elastic words "integral to the process" or the like injected by petitioner (Br. 13, 26, 42) appear nowhere in the statute.

C. Service advisors' *primary* duty is to advise and serve as liaisons, not to sell automobiles or service them. Any occasional selling or servicing is incidental to their primary job of customer relations. Indeed, a "salesman" primarily engaged in "servicing" is a contradiction in terms; if an employee is primarily engaged in servicing, that means he or she is *not* a salesman.

D. Service advisors do not sell *automobiles*. And they do not service automobiles, but rather service customers.

E. Thus, service advisors do not satisfy *any* of the statutory elements of the exemption. Even if there were doubt about one or another of those elements, however, there is no natural reading of the statutory requirement as a whole—"any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles"—that would apply to service advisors.

II.A. The subject "salesman" naturally pairs only with "selling," not "servicing." As their shared etymology confirms, the job of a salesman is to sell, not service. And it is perfectly natural for certain nouns to pair only with certain verbs, not others, according to the context. This pattern of distributive phrasing is recognized by Scalia & Garner and an opinion of this Court by Chief Justice Marshall. More than one hundred federal statutes appended to this brief use such distributive phrasing.

B. The structure of the 1974 FLSA Amendments (as well as the section-by-section analysis) confirms that "salesman" pairs with "selling," just as "partsman" and "mechanic" pair with 'servicing."

C. The statute's exemption of "partsm[e]n" does not implicitly open the door to exempting service advisors as well. Partsmen, unlike service advisors, are expressly named in the exemption. They have often worked as a mechanic's right-hand man or woman by customizing and grinding down parts, measuring parts with specialized tools, and handing parts to mechanics over a counter or in the service bay. Congress's express intent to cover "partsmen" may support an understanding of "servicing automobiles" that includes those who work closely with mechanics on and with a car's parts as well as the car itself. But that provides no justification to torture "servicing" to include white-collar, non-servicing occupations like service advisors. Congress showed no particular concern with service advisors. Nothing in the exemption indicates that Congress specifically wanted to exempt them.

III.A. Congress listed three and only three occupations at dealerships because employees in those occupations had to work irregular hours, often off-site, making it hard to track hours and standardize pay. Service advisors, by contrast, work regular and long shifts on-site.

B. A separate statutory exemption for commission-based employees, and the Portal-to-Portal Act defense, allay petitioner's concerns about reliance and disrupting the dealership industry. The bigger danger is that petitioner's amorphous, novel theories for treating "the salesforce" and "the service staff" as "two *fully exempt* categories" would greatly disrupt the accepted nonexempt status of numerous occupations at dealerships and destabilize employment relationships. Pet. Br. 34 (emphasis in original).

ARGUMENT

I. THE TEXT OF THE FLSA'S OVERTIME EXEMPTION FOR AUTOMOBILE DEALERSHIP SALESMEN, PARTSMEN, AND MECHANICS DOES NOT EXEMPT SERVICE ADVISORS

Petitioner's argument distorts the text of the statute. To shoehorn service advisors into the salesman/partsman/mechanic exemption, petitioner asserts that they are (1) salesmen who are (2) primarily (3) engaged in (4) servicing (5) automobiles. Service advisors do not satisfy any of these five textual requirements, let alone all five. Each term independently narrows the scope of the exemption. But petitioner would collapse the subject, adverb, object, and two distinct verbs into one, and replace "servicing" with "integral to the servicing process." Br. 42; *accord id.* at 13, 26. Even if service advisors occasionally or incidentally sell services, that would not make them "salesmen"; it would not qualify as "servicing," let alone "engaged in . . . servicing"; it would not be what they "primarily" do; and it would not qualify as selling or servicing "automobiles."

A. The Subjects of the Exemption Are Only "Any Salesman, Partsman, or Mechanic," Not Service Advisors

1. *Expressio Unius: Congress Exempted Only Three Specific Occupations, Not Service Advisors and Not Whole Departments.* In 1966 and again in 1974, Congress rejected its 1961 approach of a blanket exemption for entire dealerships. Nor, contrary to petitioner's assertion, did it create "*fully exempt* categories" for "the salesforce" and "the service staff." *Contra* Pet. Br. 34 (emphasis in original); *see also id.* at 8, 53, 54 (inventing categories of "[d]ealerships' core sales and service employees").

Dealership sales and service departments may comprise numerous occupations. Machinists' Amicus Br. 18–33. As the court of appeals noted, in 1966 the Department of Labor listed at least a dozen occupations in dealerships, but Congress chose to exempt only three of them (shown in bold below):

- Automobile body repairmen
- **Automobile mechanics**
- Automobile painters
- **Automobile parts countermen**

- **Automobile salesmen**
- Automobile service advisors
- Automobile upholsterers
- Bookkeeping workers
- Cashiers
- Janitors
- Purchasing agents
- Shipping and receiving clerks

Pet. App. 9 (quoting U.S. Dep't of Labor, *Occupational Outlook Handbook*, Bulletin No. 1450, at XIII–XVIII (table of contents) (1966–67 ed.)) (bold emphases in opinion below) [*1966 Occupational Outlook Handbook*]. Three and only three occupations are exempt: salesmen, partsmen, and mechanics. Service advisors were a known, listed occupation, but Congress chose not to exempt them. The statute operates at the level of specific occupations, not general categories or departments.

Given the text's specificity in exempting particular occupations, the *expressio unius* canon applies with full force. "'Where Congress explicitly enumerates certain exceptions . . . additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent.'" *TRW Inc.* v. *Andrews*, 534 U.S. 19, 28–29 (2001) (quoting *Andrus* v. *Glover Constr. Co.*, 446 U.S. 608, 616–17 (1980)).

By contrast, petitioner's reading of the statute turns the *expressio unius* canon on its head. Instead of respecting Congress's considered choice to itemize specific occupations, petitioner treats the statute as also exempting jobs that are neither fish nor fowl but "hybrid" or "'functionally similar'" to those three occupations. Pet. Br. 10, 15, 34 (quoting *Brennan* v. *Deel Motors*, 475 F.2d 1095, 1097 (5th Cir. 1973)). Congress rejected that amorphous, analogical approach in favor of three carefully drawn occupations delimited in the statute.

2. *Service Advisors Are Not Salesmen.* To get around Congress's omission of service advisors from the statutory text, petitioner seeks to shoehorn them into a distinct occupation, "salesman." But "salesman" is limited to an employee whose job it is to complete sales transactions—to make sales. By contrast, the fundamental job of a service advisor is to advise and to transmit information, not to sell.

The amicus brief filed by the International Association of Machinists and Aerospace Workers, which represents many employees in the automotive industry, collects data about what service advisors do. The brief draws on scores of NLRB opinions that have uniformly declined to equate service advisors with salesmen. As the job title suggests, service advisors serve customers by advising them. Machinists' Amicus Br. 10–12. Their role is "customer service," as a "liaison" or "communications link" between customers and the service department. *Id.* at 9, 10, 15. Their "primary duties" are to greet customers, listen to and record their repair needs, share that information with the service department, and keep customers apprised of repair updates. *Id.* at 10–11, 15; *see* J.A. 55.

This Court has made clear that the employer has the burden of proving that FLSA exemptions apply.

See Idaho Sheet Metal Works, Inc. v. *Wirtz*, 383 U.S. 190, 209 (1966). Petitioner cannot carry that burden. In claiming that service advisors are “unquestionably,” “plainly” salesmen, petitioner (Br. 3, 10, 21, 25, 26) cites only this Court’s first decision in this case, in which the Court briefly suggested that they “sell services,” but did not hold that they are “salesmen.” Pet. Br. 25–26, 37–38 (citing Pet. App. 32, 44). Contrary to petitioner’s claim, however, “employees who sell services” incidentally or on occasion are not *ipso facto* “salesmen.” It is telling that, to claim that service advisors are “salesmen,” petitioner is forced to rely upon the *dissent*. *Id.* at 38. The many NLRB and industry authorities collected in the Machinists’ brief are to the contrary.

True, service advisors may sometimes “solicit and suggest” orders for services, including for a “supplemental service” such as preventative maintenance. J.A. 54–55. But that arguable “sales component” is not enough to make their job that of a “salesman.” Machinists’ Amicus Br. 14–15. A car-rental clerk solicits customers to buy rental car insurance, a dental hygienist may suggest a tooth-whitening procedure, and a flight attendant may ask passengers if they want to buy food or alcoholic drinks, but that does not make any of them a salesman.

The statute exempts only “*salesmen* . . . primarily engaged in selling,” not others who may sell. By collapsing the subject “salesman” into the gerund “selling,” petitioner would render the subject “salesman” surplusage. Petitioner effectively reads the statute as if it exempted “anyone who is primarily engaged in selling or servicing automobiles” at an automobile dealership. Eliding the subject violates "'a cardinal principle of statutory construction,'" the canon against surplusage. *Duncan* v. *Walker*, 533 U.S. 167, 174 (2001) (quoting *Williams* v. *Taylor*, 529 U.S. 362, 404 (2000)). "It is our duty 'to give effect, if possible, to every clause and word of a statute.'" *Id.* (quoting *United States* v. *Menasche*, 348 U.S. 528, 538–39 (1955)). The subject occupations ("salesman, partsman, or mechanic") independently limit the scope of the exemption, over and above the verb phrase. Even if service advisors occasionally or incidentally sell, that does not suffice to make them salesmen.

3. *The FLSA Canon Reinforces the Expressio Unius Inference.* The *expressio unius* inference is especially strong here because Congress legislated against the backdrop of this Court's "well settled" canon of construing exemptions to the FLSA "narrowly." *Mitchell* v. *Ky. Fin. Co.*, 359 U.S. 290, 295 (1959) (Harlan, J.). That canon is an instance of this Court's general practice of "constru[ing] exceptions narrowly" so as not to swallow rules. *E.g.*, *Milner* v. *Dep't of Navy*, 562 U.S. 562, 565 (2011) (FOIA exemptions); *Chickasaw Nation* v. *United States*, 534 U.S. 84, 95 (2001) (tax exemptions); *Kawaauhau* v. *Geiger*, 523 U.S. 57, 62 (1998) (exceptions to discharge in bankruptcy).

Congress was aware of this settled canon and enacted the 1966 and 1974 FLSA Amendments against this backdrop. Discussing what became the 1974 FLSA Amendments, the House floor manager of the 1966 and 1974 Amendments explained that the exemptions for "salesmen, partsmen, and mechanics" would "be strictly interpreted" by courts. *Amendment to Exempt Employees of Boat Sales Establishments: Hearing Before the Gen. Subcomm. on Labor of the H. Comm. on Educ. and Labor*, 90th Cong. 5 (1967) (Rep. Dent). *See generally* Nat'l Emp't Lawyers Ass'n Amicus Br.

4. *The Expressio Unius Canon Also Precludes Expanding Commission-Pay Exemptions by Analogy.* Nor does commission pay convert a service advisor into a salesman. *Contra* Pet. Br. 6–7, 22, 32–34. The dealership exemption nowhere mentions commissions or other methods of pay. Yet petitioner analogizes the dealership exemption to other statutory provisions that expressly exempt some (but certainly not all) employees paid on commission, as well as "outside salesm[e]n." Br. 6–7, 22, 32 (citing 29 U.S.C. §§ 207(*i*), 213(a)(1)). The *expressio unius* canon precludes expanding such carefully limited exemptions beyond their terms. Petitioner's analogy would subvert each provision's distinctive limits and requirements.

Commission pay does not make an employee a salesman or exempt from overtime pay. As petitioner concedes, many service advisors are paid "a combination of salary or hourly wages and commissions." Pet. Br. 14 n.4. Many non-salesmen are sometimes paid on commission, including bookers, dispatchers, warranty clerks, and lube technicians, yet are not exempt. Machinists' Amicus Br. 15-16. Conversely, many exempt employees are paid salaries or hourly wages, or by some combination of measures. *Id.* at 16; *1966 Occupational Outlook Handbook* 314, 477, 480; *More About Compensating Salesmen*, Implement & Tractor, Feb. 7, 1974, at 10, 11, 49. Many kinds of commission-based employees are entitled to overtime pay, including some salesmen. Law Professors' Amicus Br. 11–14. Moreover, calculating overtime on commissions is a straightforward task, handled by personnel software and based on records that employers are already required to keep. *Id.* at 14–17. None of this has anything to do with the question presented here.

5. *The Adjective "Any" Does Not Expand the Terms It Modifies.* Petitioner relies (Br. 3, 21, 30–31) on the word "any" to shoehorn service advisors into "salesm[e]n . . . primarily engaged in selling or servicing automobiles." But the word "any" "do[es] not broaden the ordinary meaning of the" words it modifies. *BP Am. Prod. Co.* v. *Burton*, 549 U.S. 84, 93 (2006). Even when "any" is used as a "catchall . . . [it does] not . . . define what it catches." *Flora* v. *United States*, 362 U.S. 145, 149 (1960).

The effect of the term "any" depends on context. For instance, if a statute refers to "any court," one need not read it to include foreign courts, because Congress is presumed to legislate only domestically. *Small* v. *United States*, 544 U.S. 385, 388–89 (2005). Likewise, even if a pet-friendly landlord allowed tenants to bring "any cat" into their apartments, no one would dispute the landlord's right to turn away a Bengal tiger. In context, only housecats are permitted, not all felines. Here too, the exemption reaches only those whose occupation is "*salesman* . . . primarily engaged in selling or servicing automobiles," not everyone who may occasionally or incidentally sell in the course of other job duties.

B. The Verb Phrase "Engaged In Selling Or Servicing" Does Not Expand "Servicing" Beyond Performing Automotive Manual Labor

1. *Service Advisors Do Not Service Automobiles Because They Do Not Perform Automotive Manual Labor.* "Service advisors are uniformly described as having neither the skills nor tools" needed "'to perform repair or mechanical work.'" Machinists' Amicus Br. 4, 13 (quoting NLRB decision). They do not work with their hands, but write up repair estimates and work orders before the servicing begins and act as liaisons later. Service advisors are not engaged, let alone "primarily engaged," in "servicing automobiles."

"Servicing" means automotive manual labor, quintessentially maintenance or repairs. Contemporaneous dictionaries list performing mechanical work as the first definition of the transitive verb "service," and illustrate it with the example of repairing or maintaining an automobile: "To perform services of maintenance, supply, repair, installation, distribution, etc. for or upon; as, to *service* a car, a radio set, a ship, a territory." 4 *Webster's New International Dictionary of the English Language* 2288 (2d ed. 1956) [*Webster's Second*]; *accord The Random House Dictionary of the English Language* 1304 (1st ed. 1966) [*Random House Dictionary*]; *The American Heritage Dictionary of the English Language* 1185 (1st ed. 1969) [*American Heritage Dictionary*]; *Webster's Third New International Dictionary* 2075 (3d ed. 1981). In the *American Heritage* (at XLVII) and *Random House* (at xxix) dictionaries, listing a definition first conveys "the word's primary meaning."

Muscarello v. *United States*, 524 U.S. 125, 128 (1998). And the *Oxford English Dictionary*'s first definition of "servicing" is "[t]he action of maintaining or repairing a motor vehicle." 15 *Oxford English Dictionary* 39 (2d ed. 1989).

Congress has repeatedly used the term "servicing" in the United States Code to mean automotive manual labor, such as maintenance and repairs. In a statute regulating the Senate garage, for example, "the term 'servicing' includes, with respect to an official motor vehicle, the washing and fueling of such vehicle, the checking of its tires and battery, and checking and adding oil." 2 U.S.C. § 2025(b). Another statute limits ozone-depleting emissions by regulating who may "repair[] or servic[e]" vehicles' air conditioners: "[N]o person repairing or servicing motor vehicles for consideration may perform any service on a motor vehicle air conditioner . . . unless such person has been properly trained and certified." 42 U.S.C. § 7671h(c). If petitioner were correct that service advisors were engaged in servicing automobiles, they would be forbidden to schedule such air-conditioning work unless they had been "properly trained and certified."

Even if service advisors occasionally take a "look[] under the hood," Pet. Br. 42, they lack the skills and tools to diagnose and repair problems. Machinists' Amicus Br. 12–14. While they may "evaluate the service and/or repair needs of the vehicle owner *in light of complaints given them by these vehicle owners*," they do not service the vehicle or perform any mechanical operations on it. J.A. 55 (emphasis added). They may relay diagnoses made by mechanics. Machinists' Amicus Br. 11; *see* J.A. 55, ¶ 17. But it is the mechanic, not the service advisor, who repairs automobiles, just as it is the doctor, not the triage nurse, who treats illnesses.

In this case, Congress used the term "servicing" in its ordinary sense, to refer to the activity of employees who maintain or repair automobiles. Because service advisors do neither, they fall outside the statutory exemption.

2. *Selling Services Is Not the Same as Servicing.* Petitioner seeks to stretch the plain meaning of "servicing" by equating it with "selling services." Br. 29; *accord id.* at 28, 34. Petitioner's view is that "selling" is a way that one can "engage in . . . servicing." But even if service advisors could be regarded as selling services, that is not the same as "servicing." There is a fundamental difference between selling someone else's service and performing the service oneself. A middleman or woman often sells the right to a service without performing it himself or herself. Travel agents sell guided tours but do not guide the tours themselves. American Automobile Association (AAA) clerks sell emergency roadside assistance plans but do not change flat tires or charge dead batteries. Indeed, the divide between selling a service and performing that service is a premise of the sharing economy. Uber and Lyft, for example, sell driving services (like taxis) but neither own nor drive automobiles. https://www.uber.com; https://www.lyft.com.

Thus, salesmen who (unlike service advisors) do sell automobile-related services are not exempt, because they do not perform the services they sell. Underbody-coating salesmen sell a service, the spraying on of underbody coatings, yet they do not perform that service themselves, and petitioner thus concedes that they are not exempt. 15–415 Cert. Reply Br. 7 n.2. Likewise, salesmen who sell warranties are selling plans to have mechanics service automobiles, yet petitioner concedes that they are not exempt either. *Id.* Courts agree. *See, e.g.*, *Chao* v. *Rocky's Auto, Inc.*, No. 01–1318, 2003 WL 1958020, at *1, *4–5 (10th Cir. Apr. 25, 2003) (unpublished) (declining to exempt finance managers and finance contractors as salesmen because they sell extended warranties, not automobiles); *Gieg* v. *Howarth*, 244 F.3d 775, 776–77 (9th Cir. 2001) (same, for finance writers, because they sell financing, insurance, and warranties, not automobiles). Service advisors, even if assumed to be "selling," are no different.

3. *"Or" ≠ "The"; Petitioner Seeks to Transmute the Verb "Or Servicing" Into the Direct Object "The Servicing of Automobiles."* Petitioner's arguments rest on conflating words that sound alike but are different parts of speech, with different meanings: transitive verbs such as "service" or "servicing," and nouns such as "services" or "the servicing of automobiles." "Selling *or* servicing," the actual statutory language, uses a coordinate conjunction "or" to link two discrete gerunds that function as transitive verbs. But petitioner's alchemy rewrites the text into "selling *the* servicing." Petitioner inserts the definite article "the" in trying to turn "servicing" into a noun, the direct object of "selling."

Thus, petitioner asserts, without supporting authority, that "[i]t would be nonsensical to suggest that an individual primarily engaged in selling the servicing of automobiles is engaged in *neither* selling *nor* servicing automobiles." Br. 29; *accord* Br. 21–22. It is certainly not "nonsensical" to suggest that service advisors are not primarily engaged in *selling* automobiles; no one (including petitioner) claims that they are. So petitioner's claim reduces to the bald assertion that it is "nonsensical" to suggest that service advisors are not primarily engaged in *servicing* automobiles. Far from being "nonsensical," the sources cited above for the ordinary usage of "servicing automobiles" establish that service advisors are not so engaged. What petitioner needs—and fails to provide—are reasons and support for its claim, not labels like "nonsensical" to apply to a well-supported opposing view.

Petitioner's paraphrase of the statute ("an individual primarily engaged in selling the servicing of automobiles") reflects its confusion. In petitioner's paraphrase, "the servicing of automobiles" is an awkward way of phrasing "automobile services." In petitioner's paraphrase, the person selling the services need not do the servicing. But in the actual statutory exemption ("salesman . . . primarily engaged in . . . servicing"), the subject of the verb, the "salesman," must perform the "selling" or "servicing" upon the direct object "automobiles." Even if a salesman could be seen as selling automobile services performed by a mechanic, the salesman is not the one who is "servicing" the automobiles.

This Court has rejected similar efforts to conflate the two disjunctive categories on either side of the conjunction "or." For example, this Court has held that the noun "business," in the phrase "business or property," cannot be understood to modify "property" as "business property." *Reiter* v. *Sonotone Corp.*, 442 U.S. 330, 339 (1979). "Congress' use of the word 'or' makes plain that 'business' was not intended to modify 'property,' nor was 'property' intended to modify 'business.'" *Id.*; *see also Garcia* v. *United States*, 469 U.S. 70, 73 (1984) (explaining that in the phrase "of any mail matter or of any money or other property," the word "money" did not mean "postal money" or "money in the custody of postal employees").

4. *"Engaged in" Does Not Expand "Servicing" Beyond Performing Automotive Manual Labor.* Seeking to avoid the ordinary limits on "servicing," petitioner seizes on the phrase "engaged in." That phrase, it claims, expands the verb phrase "beyond just those dealership employees who personally go under the hood to service cars or personally go out on the lot to sell them." Pet. Br. 30. But far from expanding "servicing," the phrase "engaged in . . . servicing" requires that one actually and continually perform automotive manual labor.

To "engage" is "to involve oneself or become occupied; participate: *engage in conversation*." *American Heritage Dictionary* 433 (first intransitive definition). "It imports more than a single act or transaction or an occasional participation." *Black's Law Dictionary* 622 (rev. 4th ed. 1968). That requires regularly performing the action, not just assisting with its performance by others. To engage in conversation is actually to keep speaking, not merely to encourage as a bystander. To engage in swordplay is actually to thrust and parry, not just to serve as a second for a duel. When the United States supported the United Kingdom with the Lend-Lease arrangement in 1941, it was as yet only Britain, not America, that was engaged in combat.

Petitioner thus errs in equating "engaged in . . . servicing" with "integral to the process of servicing vehicles at the dealership." Br. 3; *accord id.* at 13, 26, 28, 42. No form of the word "integral" or "process" appears anywhere in this subsection. Yet Congress knew how to use such expansive modifiers and chose to use them elsewhere in the same statute, but not here. For instance, Congress exempted from overtime pay performing "services (including stripping and grading) necessary and incidental to the sale at auction of green leaf tobacco." 29 U.S.C. § 207(m)(1)(a); *accord id.* § 213(h)(1) (exempting various "services necessary and incidental" to ginning, receiving, handling, and storing cotton as well as to processing sugar).

Absent such statutory language, petitioner errs in injecting the elastic phrase "integral to the process of" into the statutory text. Its only authority states exactly the opposite of what petitioner says. Petitioner selectively quotes 29 U.S.C. § 203(j) as if it created a dichotomy between "[p]roduced" and "engaged in the production of goods," treating the latter as broader. Br. 30. The full subsection, however, treats "produced" as synonymous with "engaged in the production of goods." What broadens that definition is the phrase italicized below that petitioner does *not* quote:

> **(j)** 'Produced' means produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purposes of this chapter an employee *shall be deemed* to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any closely related process or occupation directly essential to the production thereof.

29 U.S.C. § 203(j) (emphasis added). As this Court has recognized, "shall be 'deemed' [is] *a formulation commonly employed to direct courts to make counterfactual assumptions.*" *Levin* v. *United States*, 568 U.S. 503, 514–15 (2013) (emphasis added). It is the "deem[ing]," not "engaged in," that broadens the definition by including those whom Congress recognized had *not* "[p]roduced" or "engaged in the production of goods" but nevertheless should be "deemed" to have done so.

This Court's precedents have interpreted that very subsection § 203(j) accordingly, as distinguishing "engaged in" from any "closely related process or occupation." This Court has contrasted the narrower "production in the normal sense" ("engaged in the production of goods") with the broader "production in the special sense defined in § [20]3(j)" ("deemed" to include "a host of incidental activities which are necessary to that process"). *Farmers Reservoir & Irrigation Co.* v. *McComb*, 337 U.S. 755, 759–60 (1949); *accord Roland Elec. Co.* v. *Walling*, 326 U.S. 657, 663–

64 (1946); *Warren-Bradshaw Drilling Co.* v. *Hall*, 317 U.S. 88, 91 (1942).

In short, "engaged in" means actually doing the action regularly. It does not expand the ordinary meaning of "servicing," but narrows it by importing the idea of regularity. When Congress wants to expand definitions, it adds words such as "process," "necessary," or "incidental," or it uses the counterfactual "deeming" construction. It has done neither here.

C. The Adverb "Primarily" Narrows the Verb Phrase, Limiting It to Employees Whose Essential or Chief Task Is Either Selling Automobiles or Servicing Them, Not Advising Customers

1. *"Primarily" Means "Chiefly."* Congress further narrowed the FLSA exemption only to employees who are "*primarily* engaged in selling or servicing automobiles" (emphasis added). "Primarily" means "essentially; mostly; chiefly; principally." *Random House Dictionary* 1142.

As their title implies, service advisors' "essential" or "chief" responsibility is neither selling automobiles nor servicing them. Rather, it is advising customers and acting as a liaison between customers and the service department. "Although there is undoubtedly a sales component, no cases describe the job duties of service advisors with sales as the primary responsibility." Machinists' Amicus Br. 15. And even if a few service advisors occasionally replace a light bulb or wiper blade, such "minor" tasks (for which the customer is ordinarily not charged) are "'incidental to their primary duties of greeting customers and preparing the R[epair] O[rder].'" *Id.* at 13–14 (quoting NLRB decision).

Moreover, petitioner's contention that service advisors are "salesmen . . . primarily engaged in . . . servicing automobiles" is an oxymoron. Br. 1, 3, 15, 20, 23, 25, 25, 26, 27, 29, 31, 34. By definition, a salesman must be primarily engaged in selling. As the court of appeals recognized, a person primarily engaged in *servicing* is by definition not a *salesman*. Pet. App. 17.

2. *"Actually" Is Implicit.* Petitioner repeatedly attacks the court of appeals' use of the adverb "actually" or "personally." Br. 3, 19, 22, 23, 39, 40 & n.12, 41, 42, 46. The court of appeals used "personally" only once, as a synonym for "primarily" and "actually." Pet. App. 13. And the court used both terms to contrast with "constructively," "figuratively," or "through an intermediary." Indeed, "actually" or "personally" is implicit in statutory requirements, unless Congress specifies otherwise. *E.g.*, *Honeycutt* v. *United States*, 137 S. Ct. 1626, 1635 (2017) (limiting statutory forfeiture "to property the defendant himself actually acquired" and "personally benefit[ted] from," though statute contained neither adverb). If Congress means to broaden a provision beyond "actually," it must spell out "constructively" or use "deemed" or the like. *See Levin*, 568 U.S. at 514. Congress did not do so here.

D. The Objects of the Verb Phrase Include Only "Automobiles, Trucks, or Farm Implements," Not Automobile Services

1. *Service Advisors Do Not Sell Automobiles.* While petitioner claims that service advisors sell *services*, it does not and cannot contend that they sell *automobiles*. Other dealership salesmen likewise make sales related to automobiles. There are financing salesmen, lease salesmen, insurance salesmen, and underbody-coating salesmen. Indeed, financing, insurance, and lease salesmen are closely related to the ultimate sale of automobiles, since their work may facilitate or lead to a sale. But as petitioner conceded, "salesmen who sell warranties, underbody coatings, or insurance are not primarily engaged in either selling automobiles or servicing them." 15–415 Cert. Reply Br. 7 n.2. Likewise, petitioner's amicus concedes that lease salesmen "**are not** *salesmen* under [§ 213(b)(10)(A)], since they are not selling vehicles to ultimate purchasers." Nat'l Auto Dealers Ass'n, *A Dealer Guide to the Fair Labor Standards and Equal Pay Acts* 12 (2005) (emphases in original); *see also* pp. 14–16, *supra*. Since service advisors likewise do not sell automobiles, they too are not exempt.

2. *Service Advisors Do Not Service Automobiles.* Congress did not list "services" as a direct object of "selling." To get around that omission, petitioner seeks to shoehorn "selling services" into the other gerund, "servicing." But the statute requires the subject of the exemption to service *automobiles*, and service advisors do not do so. At most, they service *customers*, and customers are not enumerated as a di-

rect object of "servicing." As the Machinists' brief explains, a service advisor holds a customer-relations position, as liaison to the mechanics who service the automobiles. Machinists' Amicus Br. 9–12. The service advisor advises the customer, not the mechanic, informing the customer of the work's status and obtaining her consent for repair work by the mechanic if needed. *Id.* Service advisors work in the front of the dealership, wearing ties and conferring with customers. *See* App., *infra*, C2 (photograph of service advisor). They do not work in the shop and do not repair automobiles.

E. The Exemption as a Whole Does Not Cover Service Advisors

Petitioner has the burden to show that the exemption applies. *Idaho Sheet Metal Works*, 383 U.S. at 209. Yet, for all of the reasons above, petitioner cannot show that *any* of the five requirements of the statute apply to a service advisor: that he or she is "any [1] salesman, . . . [2] primarily [3] engaged in [4] . . . servicing [5] automobiles." And beyond those separate points, a cardinal rule of statutory construction is that statutes must be read as a whole, such that even a plausible contrary reading of one term cannot override the remaining terms. *See United States* v. *Morton*, 467 U.S. 822, 828, 836 (1984). Even if it were thought that service advisors might satisfy one or another of those five statutory requirements, Congress could not have intended that each of them be twisted to accommodate an occupation—service advisor—that was well-known at the time but that Congress omitted from the statutory exemption.

II. THE STRUCTURE AND ENACTMENT HISTORY OF THE EXEMPTION CONFIRM THAT IT DOES NOT COVER SERVICE ADVISORS

A. The Subject "Salesman" Naturally Pairs Only with the Gerund "Selling," Not "Servicing"

The exemption applies to "any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles, trucks, or farm implements." 29 U.S.C. § 213(b)(10)(A). According to both standard English usage and canons of statutory construction, the first subject "salesman" goes with the first gerund "selling," just as the latter subjects "partsman" and "mechanic" go with the latter gerund "servicing."

1. *Salesmen Sell, Not Service.* The statutory term "salesman" naturally fits with the first gerund "selling," not "servicing." In ordinary English, a salesman is one whose job is selling. The nouns "salesman" and "sale" and the transitive verb "sell" share the same etymological root, **saljan*. 14 *Oxford English Dictionary* 391, 388, 394; *Webster's Second* 2204, 2203, 2272. By contrast, "salesman" has no etymological or semantic connection to "service" or "servicing." This Court has relied on the etymological linkage between nouns and verbs, holding that Congress's use of the verb "carry" signaled its intent to reach the etymologically related nouns "car" and "cart." *Muscarello*, 524 U.S. at 128.

Empirical data on English usage confirm that "salesman" does not fit with "servicing" automobiles. In the entire Google Books database of more than 24 million books, the phrase "salesman servicing" appears only about 150 times, almost always in the context of salesmen servicing sales accounts or territories. https://books.google.com. Only *one* example relates to servicing automobiles or similar machines: a book reporting a case that denied worker's compensation to a gas-station attendant who was injured when fixing an automobile on the side for his own profit, because servicing automobiles was *not* part of his job of selling gasoline. That is the exception that proves the rule. *Dunn* v. *Univ. of Rochester*, 194 N.E. 856, 856–57 (N.Y. 1935) (per curiam), *summarized in* N.Y. State, *Workmen's Compensation Law and Industrial Board Rules* 17 (1936).

This remarkable absence of usage refutes petitioner's strained interpretation. Any ordinary English speaker understands that "salesm[e]n" must primarily engage in "selling," not "servicing automobiles," just as "mechanic[s]" engage in "servicing," not "selling." As the court of appeals noted, it is strange to speak of a "salesman . . . primarily engaged in . . . servicing," Pet. App. 17; an employee "primarily engaged in . . . servicing" is not a salesman at all, but a mechanic, partsman, lube technician, detailer, upholsterer, or the like.

2. *In English Usage, It Is Common For Certain Nouns to Pair Only with Certain Verbs but Not Others When the Context So Indicates.* There is no reason to force every subject in the statute to pair with every gerund. English speakers and writers frequently expect listeners and readers to infer which words pair with which. In fact, the preceding sentence is an example of this pattern: "speakers . . . frequently expect listeners . . . to infer" their mean-

ing, whereas "writers frequently expect . . . readers to infer" it.

Linguists call this pattern "distributive" (as opposed to "collective") phrasing: certain nouns (or other words) in a first list pair with certain verbs (or other words) in a second list. Etymological or semantic links among the corresponding words, like those between "salesman" and "selling," often make the distributive reading even clearer.

The distributive-phrasing canon is called *reddendo* (or *referendo*) *singula singulis*. It provides for "[a]ssigning or distributing separate things to separate persons, or separate words to separate subjects." *Black's Law Dictionary* 1467 (10th ed. 2014); *accord* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 214–16 (2012) (approving of canon but noting that modern drafting has made it less necessary); 1 Earl T. Crawford, *The Construction of Statutes: A General Discussion of Certain Foundational Subjects* § 194, at 332–34 (1940); Henry Campbell Black, *Handbook on the Construction and Interpretation of the Laws* § 74, at 226–27 (2d ed. 1911).

Applying the canon depends on reading words most naturally in context: "Where a sentence contains several antecedents and several consequents, courts read them distributively and apply the words to the subjects which, *by context*, they seem most properly to relate." 2A Norman Singer et al., *Sutherland Statutes and Statutory Construction* § 47:26 (7th ed. Supp. Nov. 2016) (emphasis added).

a. *Chief Justice Marshall on Distributive Phrasing, Matching Three Terms with Two.* The *reddendo* canon dates back as far as the Marshall Court. After Maryland and Virginia ceded land to form the District of Columbia, Congress passed a statute retaining the body of law that had existed in each formerly separate part of the District. *United States* v. *Simms*, 5 U.S. (1 Cranch) 252, 253–54, 256 (1803). Maryland and Virginia had different procedures for gambling fines and forfeitures: indictment or information in Maryland, *see Baker* v. *State*, 2 H. & J. 5, 5, 1806 WL 247 (Md. 1806), or an action of debt for a statutory penalty in Virginia, *see Simms*, 5 U.S. at 252–54. A federal statute provided that "all fines, penalties and forfeitures accruing under the laws of the states of Maryland and Virginia, which by adoption have become the laws of this [D]istrict [of Columbia], shall be recovered with costs, by indictment or information in the name of the United States, or by action of debt in the name of the United States and of the informer." 5 U.S. at 254. The United States government brought a forfeiture action by indictment (the Maryland procedure) in Alexandria County (ceded by Virginia). While conceding that Virginia law did not authorize proceeding by indictment, the government argued that the statute established a "new remedy" allowing the government to proceed by indictment in Alexandria. *Id.* at 256.

Writing for the Court, Chief Justice Marshall rejected the government's argument that the statute's disjunctive phrasing authorized proceeding by indictment in Alexandria County. 5 U.S. at 258–59. Instead, applying the *reddendo* canon, the Court held that the statute authorized proceeding by indictment only when state law would have authorized that State to proceed by indictment. *Id.* at 259. The Court rejected the argument that either State's laws could be enforced via any of the three modes of proceeding: "It can not be presumed that [C]ongress could have intended to use the words in the unlimited sense contended for." *Id.* at 258. Petitioner advocates just that "unlimited sense" in this case.

b. *Congress Frequently Enacts Statutes Using Distributive Phrasing.* Congress regularly follows this pattern in drafting statutes. More than a hundred federal statutory provisions follow this general distributive pattern. App., *infra*, B1–B39.

c. *First Words Often Go with First, and Last with Last.* The order of words in the statute often reinforces the *reddendo* inference. First often goes with first, as last often goes with last. In the dealership exemption, "salesman," the first noun, pairs with "selling," the first gerund. "Partsman" and "mechanic," the last two nouns, pair with "servicing," the last gerund. As the dozens of statutes appended to this brief show, Congress often follows this distributive pattern. App., *infra*, B20–B33.

Petitioner resists this reasoning because the exemption lists three subjects (salesmen, partsmen, and mechanics) but only two gerunds (selling and servicing), so the subjects and verbs do not correspond one-to-one. Br. 44. But the distributive inference still holds, because certain subjects naturally relate to certain verbs: "salesman" to "selling," "partsman" and "mechanic" to "servicing." The same type of phrasing was at issue in *Simms,* where the statute mentioned two states (Maryland and Virginia) but three modes of proceeding (indictment, information, or action of debt). The Court had no trouble applying the *reddendo* canon to pair Maryland with indictment and information, and Virginia with action of debt.

Similarly, there are more than fifty distributively phrased federal statutes in which the number of nouns differs from the number of verbs. App., *infra*, B1–B19. For instance, a statute permits "[a]ny *person*, livestock company, or **transportation corporation** engaged in *breeding*, *grazing*, ***driving***, or ***transporting*** livestock [to] construct reservoirs upon unoccupied [federal] public lands." 43 U.S.C. § 952 (emphases added to show the paired terms). The third subject, "transportation corporation," pairs only with the third and fourth gerunds, "driving" and "transporting," not "breeding" or "grazing." (Note also the use of "engaged in" to mean actually doing the activity, not just being part of a process connected to someone else's doing the activity.)

d. *Petitioner Invents a "Fundamental Grammatical Rule" That Does Not Exist.* Petitioner resists the canon more generally, positing an inverse canon that does not exist. It imagines "a fundamental rule of grammar that when a sentence has multiple disjunctive nouns and multiple disjunctive direct-object gerunds, each noun is linked to each gerund as long as that noun-gerund combination has a sensible meaning." Br. 26–27. Notably, petitioner has never cited *any* apposite authority setting forth such a "fundamental rule of grammar," and we can find none. Petitioner's two cases say only that courts should give independent meaning to each item in a single list *A* or *B* so that neither item becomes surplusage. Br. 27. They say nothing about how one list of nouns *A*, *B*, or *C* must relate to a second list of gerunds *X* or *Y*. A distributive reading renders no word surplusage, but simply pairs each word with its appropriate referent. Petitioner's unsupported assertion is at odds with Singer, Scalia & Garner, Black, Crawford, *Black's Law Dictionary*, and Chief Justice Marshall's opinion in *Simms*. The authentic canon is *reddendo*, and it functions wherever the context indicates it is most appropriate.

e. *There Is No Reason to Limit Distributive Phrasing to Preventing Null Sets.* Petitioner next tries to limit distributive phrasing to cases "[w]here a particular theoretical combination of disjunctive nouns and gerunds produces a practical null set." Br. 44; *accord id.* ("non-existent categories"); *id.* at 43 (ruling out "practically non-existent noun-gerund combinations"). Once again, petitioner cites zero authority for its fabrication. Its *ipse dixit* is contradicted by examples from the United States Code, this Court's precedent, and common sense. Distributive phrasing depends not on impossibility, but on context.

Even where courts could force all the words to pair without creating null sets, they need not do so where the context indicates that a distributive reading makes more sense. For instance, a statute requires commercial drivers to get driver's licenses for "a *vehicle*, *machine*, *tractor*, trailer, or semitrailer *propelled* or drawn by mechanical power . . . ." 49 U.S.C. § 31301(12) (emphases added to show the paired terms). While one could imagine a vehicle that is drawn, such as an automobile or motorcycle being towed or on a vehicle-transport trailer, it would not be covered by the statute. The commercial driver needs a driver's license only for the tow truck or tractor-trailer, not a separate license for the automobile or motorcycle being drawn.

Likewise, in *Simms*, there were two states (Maryland and Virginia) but three procedures (indictment, information, and action of debt). The Court could have authorized using the Maryland procedures of indictment or information in land ceded by Virginia; indeed, the government sought exactly that. But while it would have been *possible*, in context it made less sense to do so. 5 U.S. at 258 ("It can not be presumed that [C]ongress could have intended to use the words in the unlimited sense contended for.").

The same would be true if a sporting event awarded a prize to "any runner, long jumper, or high jumper for excelling in running or jumping." One could imagine awarding a prize to a high jumper for running quickly up to the jumping line. There is no logical, physical, or practical impossibility. And there are three subjects but only two gerunds. But forcing all three nouns to pair with both gerunds would make little sense, particularly given the etymological and semantic connections between "runner" and "running," and between "jumper" and "jumping." In context, it makes far more sense to read the rule distributively, rewarding runners for their running and *both* kinds of jumpers for their jumping, but not jumpers for running fast in the run-ups to their jumps.

f. *Petitioner's Ellipses Obscure the Issue.* Much of petitioner's argument relies on its use of ellipses. Petitioner repeatedly omits the other subjects, gerunds, and objects, quoting the statute as exempting some variant of "any salesman . . . primarily engaged in . . . servicing automobiles . . . ." *E.g.*, Br. 1, 15, 16, 20, 23, 25, 31, 34. If the entire provision exempted *only* "any salesman primarily engaged in servicing automobiles," with no other subjects, gerunds, or direct objects, one might strain to find some nonzero set of salesmen who service. But that is not what Congress wrote, and the exemption covers its intended type of salesmen—those who sell automobiles—without recourse to such artifice.

B. By Amending and Re-Enacting the Statutory Text in 1974, Congress Evinced Its Understanding That "Salesman" Does Not Pair with "Servicing"

1. *The Structure of the 1974 Amendment.* Though initially enacted in 1966, the dealership exemption was substantively amended and re-enacted in 1974. That is the text under review here. Petitioner is thus wrong to criticize reference to the 1974 FLSA Amendments as "post-enactment legislative history." Br. 23, 47. The structure of the 1974 statutory amendment reflects Congress's understanding that salesmen primarily engage in selling, not servicing. This later amendment "strongly suggests" the best interpretation of the statute. *Babbitt* v. *Sweet Home Chapter*, 515 U.S. 687, 700–01 (1995).

The original 1966 exemption, § 213(b)(10), had no subsections, but the 1974 amendment split the provision into two subsections. Subsection (A) retained the existing exemption for salesmen, partsmen, and mechanics at automobile, truck, and farm-implement dealerships. Congress removed trailer and aircraft dealerships (and added boat dealerships) to a new subsection, limiting it to "any salesman primarily engaged in selling." To limit the new subsection (B) to salesmen, Congress omitted partsmen and mechanics, and the gerund "servicing" went with them. *Compare* App., *infra*, A1 (1966 version), *with* App., *infra*, A2 (1974 version).

The omission of "servicing" in the new salesmen-only subsection is telling. "[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello* v. *United States*, 464 U.S. 16, 23 (1983). Congress's choice to pair the noun "salesman" with the gerund "selling," not "servicing," confirms the distributive reading: salesmen sell, not service, and what they sell are vehicles, not services.

2. *The Section-by-Section Analysis*. On the day of the final floor vote on the 1974 FLSA Amendments, the House floor manager, Representative Dent, distributed a summary section-by-section analysis of the final bill. It read in part: "*Salesmen, Partsmen, and Mechanics.*—Provides an overtime exemption for *any salesman primarily engaged in selling automobiles*, trailers, trucks, farm implements, boats, or aircraft if employed by a [dealership]. Also provides an overtime exemption for partsmen and mechanics of automobile, truck, and farm implement dealerships." 120 Cong. Rec. 8602

(Mar. 28, 1974), *reprinted in 2 Legislative History of the Fair Labor Standards Amendments of 1974*, at 2391 (1976) (second emphasis added). No one thought Congress was exempting salesmen who engaged in anything other than selling vehicles or farm implements.

C. Congress, by Expressly Including "Partsman," Did Not Implicitly Add "Service Advisor" to the Statute

Petitioner concedes that service advisors do not go "under the hood to service cars." Br. 30; *accord id.* at 40, 42. Nevertheless, it argues that when Congress expressly added "partsman" to the list of exempt employees, it implicitly expanded the meaning of "servicing" beyond employees who "personally go under the hood to service cars" to all employees who are "integral to the servicing process." Br. 30, 42. It claims that "[p]artsmen are no more (or less) 'actually' or 'personally' involved in repairing automobiles than service advisors." Br. 22–23. Unless one reads "servicing" expansively enough to include both occupations, it asserts, "partsman" would be read "out of the statute." Br. 41.

Petitioner's unsupported assertions are mistaken. Partsmen, unlike service advisors, work with their hands on the parts of an automobile, work in the back with mechanics, and so wear uniforms suitable for dirty work.

1. *Some Partsmen Perform Automotive Manual Labor.* From 1966 through today, automobile dealership partsmen have had two distinct roles. Some sell parts directly to consumers, while others work

with and supply parts to the dealership's mechanics. *See 1966 Occupational Outlook Handbook* 312; Machinists' Amicus Br. 29–30; *see also* U.S. Dep't of Labor, *Occupational Outlook Handbook*, Bull. No. 1785, at 219 (1974–75 ed.) [*1974 Occupational Outlook Handbook*]. Both automobile and farm-implement dealerships often have a separate parts counter on the shop floor staffed by a few dedicated partsmen. Cal. State Dep't of Educ., *Auto Parts Man* 9–10 (1967); *see also* Charlie Cape, *They're Organized for Efficiency at Sell & Son*, Implement & Tractor, Feb. 7, 1973, at 9–11. "Nowhere in the automotive agency is cooperation needed more than" at the partsman's "shop counter, where mechanics and parts men meet." *Auto Parts Man* 49.

Some partsmen test, repair, and customize parts, grinding them down or building them up to the size needed. As the NLRB found, partsmen "dismantle engines and transmissions to obtain needed parts, fabricate and improvise parts, and assist mechanics in adjusting substitutes for unavailable standard auto parts." *Austin Ford, Inc.*, 136 N.L.R.B. 1398, 1400 (1962). "Parts countermen may use micrometers, calipers, fan-belt measurers, and other devices to measure parts for interchangeability." *1966 Occupational Outlook Handbook* 312–13. "[T]o determine whether parts are defective," partsmen may "use coil-condenser testers, spark plug testers, and other types of testing equipment." *Id.* at 313. Some partsmen, especially at smaller wholesalers, "may repair parts, using equipment such as brake riveting machines, brake drum lathes, valve refacers, and engine head grinders." *Id.*; *see 1974 Occupational Outlook Handbook* 219 (repeating all three quotations nearly verbatim). And some partsmen "[m]ay measure engine parts, using precision measuring instruments, to determine whether similar parts may be machined down or built up to required size." Emp't & Training Admin., U.S. Dep't of Labor, *Dictionary of Occupational Titles* § 279.357-062 (4th ed. rev. 1991), https://perma.cc/6BCP-YN5A.

Even partsmen who do not repair or adjust parts still perform automotive manual labor. Many partsmen hand parts directly to mechanics over a counter or in the service bay. *Phil Long European Imps.*, LLC, NLRB Case No. 27-RC-8071, at 8–9 (Aug. 24, 2000), https://perma.cc/8K8P-PWR2. Because they quite literally handle parts, they wear T-shirts, coveralls, jumpsuits, or similar work gear, not suits and ties or equivalent business attire. Compare, for instance, a photograph from DOL's 1966–67 handbook, showing a T-shirt-clad "[a]utomobile parts counterman dispens[ing] [a] part to [a] mechanic" by handing it to him over a counter, with the same handbook's photograph showing a service advisor wearing a tie. *Compare 1966 Occupational Outlook Handbook* 313, *reprinted at* App., *infra*, C3, *with id.* at 314–15, *reprinted at* App., *infra*, C2.

The court of appeals correctly reasoned that testing parts, repairing parts, and using expert knowledge to select and dispense appropriate replacement parts qualify as servicing. Pet. App. 14–15. Petitioner does not and cannot dispute that "test[ing] parts" and "repair[ing] parts" qualify. Pet. Br. 41. Rather, it argues that partsmen do not primarily perform these tasks. *Id.* But, in making this assertion, petitioner cites no industry authority, relying instead upon the very DOL regulation that it persuaded this Court to invalidate as inadequately reasoned. *Id.* The NLRB's decision in *Austin Ford*, as well as industry and DOL's publications, are to the contrary.

In short, partsmen, like mechanics, work with their hands. They serve as mechanics' right-hand men or women. Like mechanics and unlike service advisors, partsmen service automobiles and may have the grease under their fingernails to prove it. *Contra* Pet. Br. 22–23, 40–42.

2. *Congress's Focus in Including Partsmen Was on Farm Implements, Not Automobiles.* Congress included partsmen in the exemption after extensive testimony focused on their roles in servicing farm implements as mechanics' right-hand men or women. *Minimum Wage-Hour Legislation: Hearings Before the Subcomm. on Labor Standards of the H. Comm. on Educ. & Labor*, 86th Cong. 699–711 (1960) (testimony of Paul Milliken, Executive Vice President, National Retail Farm Equipment Association); *Minimum Wage-Hour Amendments, 1965: Hearings on H.R. 8259 Before the H. Gen. Subcomm. on Labor of the H. Comm. on Educ. & Labor*, 89th Cong. 627–40 (1965) [*1965 Hearings*] (statement of National Farm & Power Equipment Dealers Association).

Even a short delay while awaiting equipment repairs could allow a farm's crops to rot, spoil, freeze, or become infested, ruining farmers financially. Harvesting delays cost farmers hundreds, if not thousands, of dollars every single day. Donnell Hunt, *Let's Analyze the Breakdown*, Implement & Tractor, Apr. 7, 1971, at 22, 28. Thus, mechanics *and* skilled partsmen had to be on call at all hours of the day or night to "make emergency repairs" on "increasingly more complicated [and] highly sophisticated" machinery. *1965 Hearings* 630, 632; *see also* 112 Cong. Rec. 20,503 (Sen. Bayh) (citing the need for a trained partsman's knowledge and ability). Like the mechanic, the "parts man [had to be available to] respond[] to the emergency call of a farmer for a badly needed part." *1965 Hearings* 635. As Senator Mansfield explained, partsmen "ha[ve] to be available during harvest season—and before and after, to a lesser extent—at all hours of the day." 112 Cong. Rec. 20,503. Congress added partsmen to the exemption to accommodate these concerns of farm-implement dealers. *Id.* at 20,506.

3. *Including "Partsmen" in the Exemption Does Not Lead to Including Service Advisors.* Finally, petitioner's premise is that the inclusion of "partsman" in the exemption requires reading the rest of the statutory terms extremely broadly. By expressly including "partsman" in the exemption, Congress plainly wanted to include more than a null set. Even if it were not the most natural reading in isolation, "[s]ervicing automobiles" in the statute could be reasonably understood to include not only automotive manual labor on the vehicle itself, but also manual labor on and with a vehicle's parts. That meaning, however, would not help petitioner. There is no basis to expand "servicing" further, to include service advisors who work neither on or with a vehicle or its parts and who are *not* specifically named in the statute.

III. THE FLSA'S PURPOSES AND POLICIES CONFIRM THAT THE STATUTE PROTECTS SERVICE ADVISORS

A. Congress Limited the Exemption to Salesmen, Partsmen, and Mechanics Because of Their Irregular Hours and Locations

1. *Irregular Hours.* Congress enumerated three and only three occupations primarily because those employees often had to work unpredictable hours, including nights and weekends. Unlike other dealership employees working fixed hours on-site, salesmen were expected to "go out and sell an Oldsmobile, a Pontiac, or a Buick all day long and all night." 112 Cong. Rec. 20,504 (Sen. Yarborough). As Senator Yarborough, the Senate floor manager of the 1966 amendments explained, "[t]he reason for exempting the salesmen and the mechanics was the difficulty of their keeping regular hours. The salesman tries to get people mainly after their hours of work. In some cases a man will leave his job, get his wife, and go to look at automobiles. So the hours of a salesman are different." *Id.*

Partsmen and mechanics likewise must work irregular hours beyond normal business hours, often seasonally. Several farm-state senators emphasized that "during planting, cultivating and harvesting seasons, [farmers] may call on their dealers for parts at any time during the day or evening and on weekends." 112 Cong. Rec. 20,502 (Sen. Bayh). Senator Bayh recounted his own experience of "trying to get my tractor, combine, or corn-picker repaired, for which the mechanic could not find the necessary part; and he had to call the partsman, *get him out of bed*, and get him to come down to the store to show him which part should be used." *Id.* at 20,504 (Sen. Bayh) (emphasis added); *accord id.* at 20,502–04 (Sens. Bayh, Hruska, and Mansfield).

2. *Off-Site Work.* In addition, mechanics and salesmen sometimes work off-site, which makes it "difficult to keep their time records." 112 Cong. Rec. 20,505 (Sen. Clark). The Senate floor manager gave the example of "the mechanic [who] goes out and answers calls in the rural areas. . . . who has to go out on the snow-covered field." *Id.* at 20,504 (Sen. Yarborough). "The mechanics and the salesmen . . . . do not get overtime because their work is outside." *Id.* It is "the kind of work outside the store which gives some excuse, at least, for exempting the salesman and the mechanic." *Id.* at 20,505 (Sen. Clark).

Service advisors did not present either of these concerns. In 1966 and 1974, as today, they worked ordinary, fixed schedules on-site. *1966 Occupational Outlook Handbook* 316; *1974 Occupational Outlook Handbook* 224. Employers want them to work more than forty hours every week so they can advise customers "in the early morning, when most customers bring their cars in for repairs, and in late afternoon, when they return for them" after work. *Id.* (both sources). Here, for instance, petitioner required respondents to work at least from 7 a.m. to 6 p.m. all the time, not just during harvest season or for emergencies. J.A. 54. None of this is true of partsmen and mechanics; even automobile salesmen need not work early mornings.

Thus, service advisors exemplify Congress's concern with combatting not only "'underpay,'" but also "the evil of 'overwork'" by promoting a "general maximum working week." *Overnight Transp. Co.*, 316 U.S. at 578 (quoting President Franklin Roosevelt). Congress saw no need to exempt service advisors or the numerous other dealership occupations that worked regular hours on-site.

B. Stretching the Exemption Beyond Salesmen, Partsmen, and Mechanics to "Core Sales and Service Employees," Those "Integral to the Servicing Process," or Entire Sales and Service Departments Would Disrupt Settled Industry Practices

1. *The § 207(i) Commission-Pay Exemption Allays Petitioner's Concerns About Reliance and Industry Disruption.* Applying the statute and regulation as written will not unsettle expectations or disrupt the dealership industry. *Contra* Pet. Br. 51–54. As a law firm reassured its California automobile dealership clients, a ruling that service advisors are entitled to overtime should not cause "panic," because "[m]any, if not most, auto dealerships already use commission pay structures for service advisors that comply with . . . [29 U.S.C.] Section 207(i)." Navarro *Decision Should Have Little Effect on California Auto Dealers*, SCALI L. FIRM (Mar. 29, 2015), https://perma.cc/ML5W-8T8X; *accord* John Huetter, *Sky NOT Falling on Overtime for Service Advisers, Auto Body Estimators After* Navarro, REPAIRER DRIVEN NEWS (Apr. 22, 2015), https://perma.cc/DW2C-JMBP ("[T]he *Navarro* decision [below] likely affects very few, if any, employers.").

Petitioner (Br. 34) makes much of how much the average and highest-paid service advisors earn in the highest-pay region of the country. But the only commissioned service advisors who cannot qualify for the § 207(*i*) exemption are the lowest-paid fraction of service advisors, those who earn less than one-and-a-half times the minimum wage—precisely the employees who most need time-and-a-half overtime pay. In any event, the FLSA is designed not only to ensure a minimum wage, but also to encourage reasonable working conditions—including a 40-hour week. *Overnight Motor Transp.*, 316 U.S. at 578.

Moreover, Congress has already provided statutory protections that allay dealerships' retroactivity concerns. The Portal-to-Portal Act provides an affirmative defense for employers who relied on prior DOL "interpretation[s], practice[s], or enforcement polic[ies]." 29 U.S.C. § 259. The Act thus already protects the precise good-faith "reliance" interests raised by petitioner. Br. 2, 4, 12, 17, 41, 51, 52. In her concurrence, Justice Ginsburg "doubt[ed] that reliance interests would pose an insurmountable obstacle" to ruling for respondents, given the availability of the § 207(*i*) exemption, the Portal-to-Portal Act defense, and "only conclusory references to industry reliance interests" by dealerships. Pet. App. 47–48 n.2.

2. *Petitioner's Amorphous Expansion of the Exemption Would Greatly Disrupt the Industry.* Adopting petitioner's novel theories would greatly disrupt numerous occupations and industry pay practices. Treating "the salesforce" and "the service staff" as "two *fully exempt* categories," as petitioner seeks (Br.

34), would remove overtime protections from numerous occupations currently covered by the FLSA, ranging from underbody-coating salesmen, warranty salesmen, lease salesmen, insurance salesmen, financing salesmen, marketers, and receptionists, to auto body repairmen, painters, upholsterers, lube technicians, towermen, car jockeys, detailers, and parts runners. *See* Machinists' Amicus Br. 21–33. The same would be true of exempting "[d]ealerships' core sales and service employees" or those "integral to the servicing process," whatever that means. Pet. Br. 8, 42; *accord id.* at 13, 26, 28, 31, 53, 54. Expanding the exemption thus would trigger a rash of lawsuits and ensnare courts in repeated line-drawing exercises divorced from the statutory text. There is no reason to stretch the exemption by analogy beyond the three specific occupations enumerated, and doing so would be tremendously disruptive.

CONCLUSION

This Court should affirm the judgment of the court of appeals.

Respectfully submitted.

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December 8, 2017

APPENDICES

Appendix A

Fair Labor Standards Amendments of 1966,
Pub. L. No. 89–601, § 209, 80 Stat. 830, 836
(codified at 29 U.S.C. § 213(b)(10) (1966))

TITLE II—REVISION OF EXEMPTIONS

* * * * *

Automobile, Aircraft, and Farm Implement Sales Establishments

Sec. 209.

(a) Section 13(a)(19) of such Act is repealed.

(b) Section 13(b) of such Act is amended by inserting after paragraph (9) the following new paragraph in lieu of the paragraph repealed by section 212(a) of this Act:

> "(10) any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles, trailers, trucks, farm implements, or aircraft if employed by a nonmanufacturing establishment primarily engaged in the business of selling such vehicles to ultimate purchasers; or"

Fair Labor Standards Amendments of 1974,
Pub. L. No. 93–259, § 14, 88 Stat. 55, 65
(codified at 29 U.S.C. § 213(b)(10))

Salesmen, Partsmen, and Mechanics

Sec. 14.

Section 13(b)(10) (relating to salesmen, partsmen, and mechanics) is amended to read as follows:

> "(10)(A) any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles, trucks, or farm implements, if he is employed by a nonmanufacturing establishment primarily engaged in the business of selling such vehicles to ultimate purchasers; or
>
> "(B) any salesman primarily engaged in selling trailers, boats, or aircraft if employed by a nonmanufacturing establishment primarily engaged in the business of selling trailers, boats, or aircraft to ultimate purchasers; or".

Appendix B

Federal Statutory Provisions That Are Phrased at Least in Part Distributively (*e.g.*, not all the nouns pair with all the verbs)

Appendix B-1

53 Distributively Phrased Statutes in Which the Number of Words in the First List Does Not Equal the Number of Words in the Second List

49 U.S.C. § 30301(4)	"'[M]otor vehicle' means a *vehicle, machine, tractor,* trailer, or semitrailer *propelled* or drawn by mechanical power and used on public streets, roads, or highways, but does not include a vehicle operated only on a rail line."
49 U.S.C. § 31301(12)	"'[M]otor vehicle' means a *vehicle, machine, tractor,* trailer, or semitrailer *propelled* or drawn by mechanical power and used on public streets, roads, or highways, but does not include a vehicle, machine, tractor, trailer, or semitrailer operated only

	on a rail line or custom harvesting farm machinery."
49 U.S.C. § 13102(16)	"The term 'motor vehicle' means a *vehicle, machine, tractor,* trailer, or semitrailer *propelled* or drawn by mechanical power and used on a highway in transportation, or a combination determined by the Secretary, but does not include a vehicle, locomotive, or car operated only on a rail, or a trolley bus operated by electric power from a fixed overhead wire, and providing local passenger transportation similar to street-railway service."
16 U.S.C. § 742c(e)	"The Secretary is authorized under such terms and conditions and pursuant to regulations prescribed by him to use the funds appropriated under this section to make loans to commercial fishermen for the purpose of chartering fishing vessels pending the *construction* or repair of vessels *lost, destroyed,* or damaged by the earthquake of March 27, 1964, and subsequent tidal waves related thereto ...."

16 U.S.C. § 428i	"or shall *cut down* or *fell* or **remove** any ***timber***, **battle relic**, ***TREE***, or ***TREES GROWING*** or **being** upon such battlefield ...."
16 U.S.C. § 430q	"or shall *cut down* or *fell* or ***remove*** any ***timber***, **battle relic**, ***TREE*** or ***TREES GROWING*** or **being** upon said park ...."
16 U.S.C. § 425g	"or shall *cut down* or *fell* or ***remove*** any ***timber***, **battle relic**, ***TREE*** or ***TREES GROWING*** or **being** upon said park ...."
16 U.S.C. § 426i	"or shall *cut down* or *fell* or ***remove*** any ***timber***, **battle relic**, ***TREE***, or ***TREES GROWING*** or **being** upon such battlefield ...."
16 U.S.C. § 423f	"or shall *cut down* or *fell* or ***remove*** any ***timber***, **battle relic**, ***TREE*** or ***TREES GROWING*** or **being** upon said battlefield ...."
16 U.S.C. § 430i	"or shall *cut down* or *fell* or ***remove*** any ***timber***, **battle relic**, ***TREE***, or ***TREES GROWING*** or **being** upon said park ..."

16 U.S.C. § 430h	“or shall *cut down* or *fell* or ***remove*** any ***timber***, **battle relic**, ***TREE***, or ***TREES GROWING*** or **being** upon said park ….”
43 U.S.C. § 952	“Any *person*, livestock company, or **transportation corporation** engaged in *breeding*, *grazing*, ***driving***, *or* ***transporting*** livestock may construct reservoirs upon unoccupied public lands of the United States, not mineral or otherwise reserved, for the purpose of furnishing water to such livestock, and shall have control of such reservoir ….”
42 U.S.C. § 7384n(c)(4)	“In the case of an atomic weapons employee described in section 7384*l*(3)(B) of this title, the following doses of radiation shall be treated, for purposes of paragraph (3)(A) of this subsection, as part of the radiation dose received by the employee at such facility: (A) Any dose of ionizing radiation received by that employee from *facilities*, *materials*, *devices*, or by-products *used* or generated in the research, development, production, dismantlement, transportation, or testing of nuclear weapons, or from any activities to research, produce, process, store, remediate, or dispose of radioactive materials

	by or on behalf of the Department of Energy ..."
Burmese Freedom and Democracy Act of 2003, Pub. L. 108-61, § 2(8), 117 Stat. 864	"The SPDC has demonstrably failed to cooperate with the United States in stopping the flood of *heroin* and methamphetamines being *grown*, *refined*, *manufactured*, and *transported* in areas under the control of the SPDC serving to flood the region and much of the world with these illicit drugs."
22 U.S.C. § 3929(b)	"Inspections, investigations, and audits conducted by or under the direction of the Inspector General shall include the systematic review and evaluation of the administration of activities and operations of Foreign Service posts and bureaus and other operating units of the Department of State, including an examination of-- (1) whether *financial transactions* and accounts are properly *conducted*, *maintained*, and *reported* ...."
42 U.S.C. § 1592e	"The Secretary of Housing and Urban Development may, in his discretion, upon request of the Secretary of Defense or his designee, transfer to the jurisdiction of the Department of

	Defense without reimbursement any land, *improvements*, *housing*, or *community facilities* *constructed* or acquired under the provisions of this subchapter and considered by the Department of Defense to be required for the purposes of the said Department."
15 U.S.C. § 272(e)(1)	"In carrying out the activities under subsection (c)(15), the Director-- ... (B) shall not prescribe or otherwise require ... (iii) that information or communications technology *products* or services be *designed*, *developed*, or *manufactured* in a particular manner."
15 U.S.C. § 636(b)(15)	"[The Small Business Administration] may make any loan for *repair*, *rehabilitation*, or *replacement* of property *damaged* or destroyed without regard to whether the required financial assistance is otherwise available from private sources ...."
22 U.S.C. § 2779a(d)(1)	"[T]he term 'offset agreement' means an agreement, arrangement, or understanding between a United States supplier of defense articles or defense services and a foreign

	country under which the supplier agrees to purchase or acquire, or to promote the purchase or acquisition by other United States persons of, ***goods*** or services *produced*, ***manufactured***, *grown*, or *extracted*, in whole or in part, in that foreign country in consideration for the purchase by the foreign country of defense articles or defense services from the supplier ...."
31 U.S.C. § 3801(b)(2)	"[E]ach claim for property, services, or money is subject to this chapter regardless of whether such *property*, *services*, or *money* is actually *delivered* or paid ...."
12 U.S.C. § 632	"Nothing in this section shall be deemed to repeal or to modify in any manner any of the provisions of the Gold Reserve Act of 1934, as amended, the Silver Purchase Act of 1934, as amended, or subdivision (b) of section 5 of the Act of October 6, 1917, as amended, or any *actions*, **REGULATIONS**, **RULES**, **ORDERS**, or **PROCLAMATIONS** *taken*, promulgated, **made**, or ISSUED pursuant to any of such statutes."

5 U.S.C. § 504(a)(2)	"A party seeking an award of fees and other expenses shall, within thirty days of a final disposition in the adversary adjudication, submit to the agency an application which shows that the party is a prevailing party and is eligible to receive an award under this section, and the amount sought, including an itemized statement from any *attorney*, *agent*, or expert witness *representing* or appearing in behalf of the party stating the actual time expended and the rate at which fees and other expenses were computed."
16 U.S.C. § 572(c)	"That when by the terms of a written agreement either party thereto furnishes materials, supplies, equipment, or services for fire emergencies in excess of its proportionate share, adjustment may be made by reimbursement or by replacement in kind of *supplies*, *materials*, and equipment *consumed* or destroyed in excess of the furnishing party's proportionate share."
22 U.S.C. § 8123(b)(2)	"A judge of the United States shall promptly issue an administrative search warrant authorizing the requested comple-

	mentary access upon an affidavit submitted by the United States Government ... (F) listing the *items*, *documents*, and *areas* to be *searched* and seized ..."
22 U.S.C. § 6725(b)(2)	"The judge of the United States shall promptly issue a warrant authorizing the requested inspection upon an affidavit submitted by the United States Government showing that ... (D) the *items*, *documents*, and *areas* to be *searched* and seized ..."
47 U.S.C. § 155(c)(3)	"Any *order*, *decision*, *report*, or action *made* or taken pursuant to any such delegation, unless reviewed as provided in paragraph (4) of this subsection, shall have the same force and effect, and shall be made, evidenced, and enforced in the same manner, as orders, decisions, reports, or other actions of the Commission."
47 U.S.C. § 155(c)(4)	"Any person aggrieved by any such order, decision, report or action may file an application for review by the Commission within such time and in such manner as the Commission

	shall prescribe, and every such application shall be passed upon by the Commission. The Commission, on its own initiative, may review in whole or in part, at such time and in such manner as it shall determine, any *order*, *decision*, *report*, or action *made* or taken pursuant to any delegation under paragraph (1) of this subsection."
47 U.S.C. § 155(c)(7)	"The filing of an application for review under this subsection shall be a condition precedent to judicial review of any *order*, *decision*, *report*, or action *made* or taken pursuant to a delegation under paragraph (1) of this subsection."
16 U.S.C. § 916g(a)	"Subject to the provisions of the convention, any person authorized to enforce ... the regulations of the Secretary of Commerce may seize, whenever and wherever lawfully found, all *whales* or whale products *taken*, *processed*, or *possessed* contrary to the provisions of the [International Convention for the Regulation of Whaling] ...."

16 U.S.C. § 668b(c)	"That all *powers*, rights, and **duties** ***conferred*** or **imposed** by the customs laws upon any officer or employee of the Treasury Department shall, for the purposes of this subchapter, be *exercised* or **performed** ...."
16 U.S.C. § 670j(d)	"except that all *powers*, rights, and **duties** ***conferred*** or **imposed** by the customs laws upon any officer or employee of the Department of the Treasury shall, for the purposes of this section, be *exercised* or **performed** ...."
16 U.S.C. § 2439(e)	"except that all *powers*, rights, and **duties** ***conferred*** or **imposed** by the customs laws upon any officer or employee of the Customs Service may, for the purposes of this chapter, also be *exercised* or **performed** ...."
16 U.S.C. § 3374(b)	"except that all *powers*, rights, and **duties** ***conferred*** or **imposed** by the customs laws upon any officer or employee of the Treasury Department may, for the purposes of this chapter also be *exercised* or **performed** ...."

16 U.S.C. § 2409(e)	"except that all *powers*, rights, and **duties** ***conferred*** or **imposed** by the customs laws upon any officer or employee of the Customs Service may, for the purposes of this chapter, also be *exercised* or **performed** ...."
16 U.S.C. § 742j-1(f)	"except that all *powers*, rights, and **duties** ***conferred*** or **imposed** by the customs laws upon any officer or employee of the Treasury Department shall, for the purposes of this section, be *exercised* or **performed** by the Secretary of the Interior or by such persons as he may designate."
16 U.S.C. § 1540(e)(5)	"except that all *powers*, rights, and **duties** ***conferred*** or **imposed** by the customs laws upon any officer or employee of the Treasury Department shall, for the purposes of this chapter, be *exercised* or **performed** by the Secretary or by such persons as he may designate."
15 U.S.C. § 77jjj(a)(3)	"If the indenture to be qualified requires or permits the appointment of one or more co-trustees in addition to such institutional trustee, the *rights*, powers, **duties**, and OBLIGA-

TIONS ***CONFERRED*** or **IMPOSED** upon the trustees or any of them shall be ***CONFERRED*** or **IMPOSED** upon and *exercised* or **PERFORMED** by such institutional trustee, or such institutional trustee and such co-trustees jointly ..."

8 U.S.C. § 1104(a)

"He is authorized to confer or impose upon any employee of the United States, with the consent of the head of the department or independent establishment under whose jurisdiction the employee is serving, any of the *powers*, functions, or **duties** ***conferred*** or **imposed** by this chapter or regulations issued thereunder upon officers or employees of the Department of State or of the American Foreign Service."

50 U.S.C. § 4556(b)

"The termination of the authority granted in any title or section of this Act, or of any rule, regulation, or order issued thereunder, shall not operate to defeat any suit, action, or prosecution, whether theretofore or thereafter commenced, with respect to any *right*, liability, or **offense** *incurred* or **committed** prior to the termination date of such title or of

	such rule, regulation, or order.”
33 U.S.C. § 702i	“The provisions of sections 407, 408, 411, 412, and 413 of this title are made applicable to all *lands*, *waters*, *easements*, and other *property* and *rights acquired* or constructed under the provisions of sections … of this title.”
15 U.S.C. § 13(d)	“It shall be unlawful for any person engaged in commerce to pay or contract for the payment of anything of value to or for the benefit of a customer of such person in the course of such commerce as compensation or in consideration for any services or facilities furnished by or through such customer in connection with the processing, handling, sale, or offering for sale of any *products* or commodities *manufactured*, *sold*, or *offered for sale* by such person, unless such payment or consideration is available on proportionally equal terms to all other customers competing in the distribution of such products or commodities.”

23 U.S.C. § 403(c)(1)	"[T]he Secretary is authorized to carry out, on a cost-shared basis, collaborative research and development with … (A) non-Federal entities, including State and local governments, *colleges*, *universities*, *corporations*, partnerships, sole proprietorships, *organizations*, and *trade associations* that are *incorporated* or established under the laws of any State or the United States …."
33 U.S.C. § 2313(a)	"For the purpose of improving the state of engineering and construction in the United States and consistent with the civil works mission of the Army Corps of Engineers, the Secretary is authorized to utilize Army Corps of Engineers laboratories and research centers to undertake, on a cost-shared basis, collaborative research and development with non-Federal entities, including State and local government, *colleges* and *universities*, and *corporations*, partnerships, sole proprietorships, and *trade associations* which are *incorporated* or established under the laws of any of the several States of the United States or the District of Columbia."

23 U.S.C. § 502(c)(1)	"To encourage innovative solutions to surface transportation problems and stimulate the deployment of new technology, the Secretary may carry out, on a cost-shared basis, collaborative research and development with-- (A) ... non-Federal entities, including State and local governments, foreign governments, *colleges* and *universities*, *corporations*, *institutions*, partnerships, sole proprietorships, and *trade associations* that are *incorporated* or established under the laws of any State ...."
22 U.S.C. § 2459(b)	"If in any judicial proceeding in any such court any such *process*, judgment, **decree**, or ORDER is ***SOUGHT***, **ISSUED**, or **ENTERED**, the United States attorney for the judicial district within which such proceeding is pending shall be entitled as of right to intervene as a party to that proceeding ...."
18 U.S.C. § 218	"In addition to any other remedies provided by law the President or, under regulations prescribed by him, the head of any department or agency involved, may declare void and rescind any ***CONTRACT***, ***LOAN***, ***GRANT***, ***SUBSIDY***, ***LICENSE***, ***RIGHT***,

	PERMIT, ***FRANCHISE***, ***USE***, AUTHORITY, *PRIVILEGE*, ***BENEFIT***, *CERTIFICATE*, *RULING*, *DECISION*, OPINION, or RATE SCHEDULE *awarded*, **granted**, **paid**, FURNISHED, or published, or the performance of any service or transfer or delivery of any thing to, by or for any agency of the United States or officer or employee of the United States or person acting on behalf thereof, in relation to which there has been a final conviction for any violation of this chapter, and the United States shall be entitled to recover in addition to any penalty prescribed by law or in a contract the amount expended or the thing transferred or delivered on its behalf, or the reasonable value thereof."
15 U.S.C. § 717d(a)	"Whenever the Commission ... shall find that any *rate*, charge, or **classification** ***demanded***, ***observed***, *charged*, or *collected* by any natural-gas company in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential

	...."
16 U.S.C. § 824e(a)	"Whenever the Commission, after a hearing held upon its own motion or upon complaint, shall find that any ***rate***, charge, or **classification**, ***demanded***, ***observed***, *charged*, or *collected* by any public utility for any transmission or sale subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory or preferential ...."
15 U.S.C. § 2065(a)	"[O]fficers or employees duly designated by the [Consumer Product Safety Commission] ... are authorized-- (1) to enter, at reasonable times, (A) any *factory*, warehouse, or **establishment** in which consumer products are ***manufactured*** or **held**, in connection with distribution in commerce ...."
Transfer of Forest Tree Nursery Facilities to States, Pub. L. No. 87-	"restoration to the trust fund of an amount equal to the residual value of any *supplies*, *materials*, *equipment*, or *improvements* *acquired* or constructed with trust funds and

492, § 1, 76 Stat. 107 (1962)	transferred to State forestry work other than the soil bank program; that such program under said Soil Bank Act has been discontinued, but the need for the trees continues to be great ...”
42 U.S.C. § 16423(c)(1)	“The term ‘qualifying advanced power system technology facility’ means a facility using an advanced *fuel cell, turbine*, or *hybrid power system* or power storage system to *generate* or store electric energy.”
39 U.S.C. § 3001(k)(1)(C)	“the term ‘skill contest’ means a puzzle, game, competition, or other contest in which-- ... (iii) a *purchase*, *payment*, or donation is *required* or implied to be required to enter the contest ....”
7 U.S.C. § 1627b(f)(2)	“The Board shall ... (B) review any *contract*, *direct loan*, *loan guarantee*, *cooperative agreement*, *equity interest*, *investment*, *repayable grant*, and *grant* to be *made* or entered into by the Center and any financial assistance provided to the Center ....”

Appendix B-2

37 Distributively Phrased Statutes in Which the First Word(s) of the First List Pair Only with the First Word(s) of the Second List and the Last Word(s) Pair Only with the Last Word(s)

49 U.S.C. § 30301(4)	"'[M]otor vehicle' means a *vehicle*, *machine*, *tractor*, trailer, or semitrailer *propelled* or drawn by mechanical power and used on public streets, roads, or highways, but does not include a vehicle operated only on a rail line."
49 U.S.C. § 31301(12)	"'[M]otor vehicle' means a *vehicle*, *machine*, *tractor*, trailer, or semitrailer *propelled* or drawn by mechanical power and used on public streets, roads, or highways, but does not include a vehicle, machine, tractor, trailer, or semitrailer operated only on a rail line or custom harvesting farm machinery."
49 U.S.C. § 13102(16)	"The term 'motor vehicle' means a *vehicle*, *machine*, *tractor*, trailer, or semitrailer *propelled* or drawn by mechanical power and used on a highway in transportation, or a combi-

	nation determined by the Secretary, but does not include a vehicle, locomotive, or car operated only on a rail, or a trolley bus operated by electric power from a fixed overhead wire, and providing local passenger transportation similar to street-railway service."
16 U.S.C. § 742c(e)	"The Secretary is authorized under such terms and conditions and pursuant to regulations prescribed by him to use the funds appropriated under this section to make loans to commercial fishermen for the purpose of chartering fishing vessels pending the *construction* or repair of vessels *lost, destroyed*, or damaged by the earthquake of March 27, 1964, and subsequent tidal waves related thereto ...."
7 U.S.C. § 7470(d)	"On completion of a referendum under subsection (b) of this section, the Secretary shall suspend or terminate the order that was subject to the referendum at the end of the marketing year if-- (1) the suspension or termination of the order is favored by not less than a majority of the producers and importers voting in the referendum; and (2) the *producers* and

	importers *produce* and import more than 50 percent of the total volume of kiwifruit *produced* and imported by persons voting in the referendum."
7 U.S.C. § 8401(a)(1)(B)	"In determining whether to include an agent or toxin on the list under subparagraph (A), the Secretary shall-- (i) consider ... (III) the availability and effectiveness of *pharmacotherapies* and prophylaxis to *treat* and prevent any illness caused by the agent or toxin ..."
7 U.S.C. § 4611(b)(1)	"No order issued under this chapter shall be effective unless the Secretary determines that-- (A) the order is approved by a majority of the producers, importers, and if covered by the order, handlers, voting in the referendum; and (B) the *producers*, importers, and **handlers** comprising the majority *produced*, imported, and **handled** not less than 50 percent of the quantity of the honey and honey products *produced*, imported, and **handled** during the representative period by the persons voting in the referendum."

42 U.S.C. § 300j(c)(1)	"Such order shall apply to such manufacturers, producers, processors, distributors, and repackagers of such chemical or substance as the President or his delegate deems necessary and appropriate, except that such order may not apply to any *manufacturer*, producer, or **processor** of such chemical or substance who *manufactures*, produces, or **processes** (as the case may be) such chemical or substance solely for its own use."
42 U.S.C. § 262a(a)(1)(B)	"In determining whether to include an agent or toxin on the list under subparagraph (A), the Secretary shall-- (i) consider-- ... (III) the availability and effectiveness of *pharmacotherapies* and immunizations to *treat* and prevent any illness resulting from infection by the agent or toxin ..."
43 U.S.C. § 902	"If at any time prior to the institution of suit by the Attorney General to cancel any *patent* or certification of lands erroneously *patented* or certified a claim or statement is presented to the Secretary of the Interior by or on behalf of any person

	or persons …"
11 U.S.C. § 1502(8)	"[A]ny property subject to *attachment* or garnishment that may properly be *seized* or garnished by an action in a Federal or State court in the United States."
7 U.S.C. § 6506(a)	"A program established under this chapter shall … (4) require each certified organic farm or each certified organic handling operation to certify to the Secretary, the governing State official (if applicable), and the certifying agent on an annual basis, that such *farm* or handler has not *produced* or handled any agricultural product sold or labeled as organically produced except in accordance with this chapter …"
33 U.S.C. § 1504(c)(2)	"Each application shall include such financial, technical, and other information as the Secretary deems necessary or appropriate. Such information shall include, but need not be limited to … (G) the location and capacity of existing and proposed *storage facilities* and pipelines which will *store* or

	transport oil transported through the deepwater port …"
15 U.S.C. § 636(b)(3)(A)(iii)	"[T]he term 'substantial economic injury' means an economic harm to a business concern that results in the inability of the business concern … (III) to *market*, produce, or **provide** a product or service ordinarily *marketed*, produced, or **provided** by the business concern."
26 U.S.C. § 834(c)(6)	"In the application of section 1212 for purposes of this section, the net capital loss for the taxable year shall be the amount by which losses for such year from sales or exchanges of capital assets exceeds the sum of the gains from such sales or exchanges and whichever of the following amounts is the lesser: … or (B) losses from the *sale* or exchange of capital assets *sold* or exchanged to obtain funds to meet abnormal insurance losses and to provide for the payment of dividends and similar distributions to policyholders."
12 U.S.C.	"which shall be in the Department of Housing and Urban Development and which shall retain the *assets* and liabilities

§ 1717(a)(2)(A)	*acquired* and incurred under sections 1720 and 1721 of this title prior to such date ..."
12 U.S.C. § 1717(a)(2)(B)	"The other such separated portion shall be a body corporate to be known as Federal National Mortgage Association (hereinafter referred to as the "corporation"), which shall retain the *assets* and liabilities *acquired* and incurred under sections 1718 and 1719 ..."
7 U.S.C. § 5822(g)(1)(E)	"In the case of any *tenant* or lessee who has *rented* or leased the farm (with or without a written option for annual renewal or periodic renewals) for a period of two or more of the immediately preceding years, the Secretary shall consider the refusal by a landlord, without reasonable cause other than simply for the purpose of enrollment in the program, to renew such rental or lease as an involuntary displacement in the absence of a written consent to such nonrenewal by the tenant or lessee."

25 U.S.C. § 1633(b)	"For the purpose of implementing the provisions of this subchapter, the Secretary shall assure that the rates of pay for personnel engaged in the *construction* or renovation of facilities *constructed* or renovated in whole or in part by funds made available pursuant to this subchapter are not less than the prevailing local wage rates for similar work as determined in accordance with sections 3141-3144, 3146, and 3147 of Title 40."
10 U.S.C. § 2563(b)	"The Secretary may designate facilities referred to in subsection (a) as the facilities from which *articles* and services *manufactured* or performed by such facilities may be sold under this section."
10 U.S.C. § 2563(a)(2)(A)	"Except as provided in subparagraph (B), articles and services referred to in paragraph (1) are *articles* and services that are *manufactured* or performed by any working-capital funded industrial facility of the armed forces."

10 U.S.C. § 2563(c)(1)	"A sale of articles or services may be made under this section only if ... (C) the *articles* or services can be substantially *manufactured* or performed by the industrial facility concerned with only incidental subcontracting ...."
7 U.S.C. § 1a(18)	"The term 'eligible contract participant' means ... (v) a corporation, partnership, proprietorship, organization, trust, or other entity-- ... (III) that-- ... (bb) enters into an agreement, contract, or transaction in connection with the conduct of the entity's business or to manage the risk associated with an *asset* or liability *owned* or incurred or reasonably likely to be *owned* or incurred by the entity in the conduct of the entity's business ...."
10 U.S.C. § 2740(2)	"A case in which-- (A) the *loss* or damage occurred while the *lost* or damaged goods were in the possession of an ocean carrier that was transporting, loading, or unloading the goods under a Department of Defense contract for ocean carriage ..."

10 U.S.C. § 2740(3)(C)	"[A] claim submitted to the delivering transportation service provider or carrier is denied in whole or in part because the *loss* or damage occurred while the *lost* or damaged goods were in the custody of a prior transportation service provider or carrier or government entity."
7 U.S.C. § 950(a)(3)	"[T]he telephone bank shall cease to be an agency of the United States, but shall continue in existence in perpetuity as an instrumentality of the United States and as a banking corporation with all of the *powers* and limitations *conferred* or imposed by this subchapter except such as shall have lapsed pursuant to the provisions of this subchapter."
47 U.S.C. § 326	"Nothing in this chapter shall be understood or construed to give the Commission the power of censorship over the radio communications or signals transmitted by any radio station, and no *regulation* or condition shall be *promulgated* or fixed by the Commission which shall interfere with the right of free speech by means of radio communication."

26 U.S.C. § 312(f)(1)(B)	"*Gain* or loss so realized shall *increase* or decrease the earnings and profits to, but not beyond, the extent to which such a realized gain or loss was recognized in computing taxable income under the law applicable to the year in which such sale or disposition was made."
33 U.S.C. § 1341(a)(4)	"[T]he licensee or permittee shall provide an opportunity for such certifying State, or, if appropriate, the interstate agency or the Administrator to review the manner in which the *facility* or activity shall be *operated* or conducted for the purposes of assuring that applicable effluent limitations or other limitations or other applicable water quality requirements will not be violated."
30 U.S.C. § 625	"Notwithstanding any other provisions of this chapter, all mining claims and mill sites or mineral rights located under the terms of this chapter or otherwise contained on the public lands as described in section 621 of this title shall be used only for the purposes specified in section 621 of this title and no *facility* or activity shall be *erected* or conducted thereon

	for other purposes."
10 U.S.C. § 1074b(a)(2)	"A member of, and a designated applicant for membership in, the Senior Reserve Officers' Training Corps who incurs or aggravates an injury, illness, or disease-- (A) in the line of duty while performing duties under section 2109 of this title; (B) while *traveling directly to* or from the place at which that member or applicant *is to perform* or has performed duties pursuant to section 2109 of this title ...."
28 U.S.C. § 1453(d)	This section shall not apply to any class action that solely involves-- ... (2) a claim that relates to the internal affairs or governance of a *corporation* or other form of business enterprise and arises under or by virtue of the laws of the State in which such *corporation* or business enterprise is *incorporated* or organized ...."
28 U.S.C. § 1332(d)(9)	"Paragraph (2) shall not apply to any class action that solely involves a claim ... (B) that relates to the internal affairs or governance of a *corporation* or other form of business enter-

	prise and that arises under or by virtue of the laws of the State in which such *corporation* or business enterprise is *incorporated* or organized ...."
42 U.S.C. § 6977(b)(1)	"Subject to the provisions of paragraph (2), grants or contracts may be made to pay all or a part of the costs, as may be determined by the Administrator, of any project operated or to be operated by an eligible organization, which is designed ... (B) to train *instructors* and supervisory personnel to *train* or supervise persons in occupations involving the design, operation, and maintenance of solid waste management and resource recovery equipment and facilities."
12 U.S.C. § 1821(n)(1)(B)	"Upon the granting of a charter to a bridge depository institution, the bridge depository institution may-- (i) assume such deposits of such insured depository *institution* or institutions that *is* or are in default or in danger of default as the Corporation may, in its discretion, determine to be appropriate; (ii) assume such other liabilities (including liabilities associated with any trust business) of such insured depository

	institution or institutions that *is* or are in default or in danger of default as the Corporation may, in its discretion, determine to be appropriate; (iii) purchase such assets (including assets associated with any trust business) of such insured depository *institution* or institutions that *is* or are in default or in danger of default as the Corporation may, in its discretion, determine to be appropriate ...."
8 U.S.C. § 1101(b)(1)(G)(i)(V)	"[I]n the case of a child who has not been adopted-- ... (bb) the prospective adoptive *parent* or parents *has* or have complied with any pre-adoption requirements of the child's proposed residence ...."
5 U.S.C. § 8313(b)	"The prohibition on payment of annuity or retired pay under subsection (a) of this section applies to the period after the end of the 1-year period and continues until-- ... (2) the individual returns and thereafter the *indictment* or charges *is* or are dismissed ...."

Appendix B-3
15 Other Distributively Phrased Statutes

28 U.S.C. § 636(a)	"Each United States magistrate judge serving under this chapter shall have within the district in which sessions are held by the court that appointed the magistrate judge, at other places where that court may function, and elsewhere as authorized by law-- (1) all *powers* and duties *conferred* or imposed upon United States commissioners by law or by the Rules of Criminal Procedure for the United States District Courts ..."
48 U.S.C. § 1422c(b)	"All officers shall have such *powers* and *duties* as may be *conferred* or imposed on them by law or by executive regulation of the Governor not inconsistent with any law."
25 U.S.C. § 112	"The superintendent, agent, or subagent, together with such military officer as the President may direct, shall be present, and certify to the delivery of all *goods* and money required to be paid or *delivered* to the Indians."

15 U.S.C. § 69g(a)(1)	"Any fur product or fur shall be liable to be proceeded against in the district court of the United States for the district in which found, and to be seized for confiscation by process of libel for condemnation, if the Commission has reasonable cause to believe such *fur product* or fur is being *manufactured* or *held for shipment*, or *shipped*, or *held for sale or exchange* after shipment, in commerce, in violation of the provisions of this subchapter …"
46 U.S.C. § 3302(c)(3)(C)	"In this paragraph, the term 'proprietary cargo' means cargo that … (iii) consists of *fish* or fish products *harvested* or *processed* by the owner of the vessel or any affiliated entity or subsidiary."
42 U.S.C. § 3611(a)	"The Secretary may, in accordance with this subsection, issue subpoenas and order discovery in aid of investigations and hearings under this subchapter. Such subpoenas and discovery may be ordered to the same extent and subject to the same limitations as would apply if the *subpoenas* or discovery were ordered or *served* in aid of a civil action in the United States

	district court for the district in which the investigation is taking place."
23 U.S.C. § 109(l)(2)(A)	"[T]he term 'utility facility' means any privately, publicly, or cooperatively owned *line*, facility, or **system** for **producing**, ***transmitting***, or ***distributing*** communications, power, electricity, light, heat, gas, oil, crude products, water, steam, waste, storm water not connected with highway drainage, or any other similar commodity, including any fire or police signal system or street lighting system, which directly or indirectly serves the public ...."
19 U.S.C. § 81r(c)	"The clerk of the court in which such a petition is filed shall immediately cause a copy thereof to be delivered to the Board and it shall thereupon file in the court the record in the proceedings held before it under this section, as provided in section 2112 of Title 28. The *testimony* and evidence *taken* or *submitted* before the Board, duly certified and filed as a part of the record, shall be considered by the court as the evidence in

	the case."
7 U.S.C. § 8(b)	"The clerk of the court in which such a petition is filed shall immediately cause a copy thereof to be delivered to the Commission and file in the court the record in such proceedings, as provided in section 2112 of Title 28. The *testimony* and evidence *taken* or *submitted* before the Commission, duly filed as aforesaid as a part of the record, shall be considered by the court of appeals as the evidence in the case. Such a court may affirm or set aside the order of the Commission or may direct it to modify its order."
54 U.S.C. § 101118(a)	"The National Park Foundation and any *income* or property *received* or owned by it, and all transactions relating to that income or property, shall be exempt from all Federal, State, and local taxation."
16 U.S.C. § 583j-2(e)(3)	"The Foundation and any *income* or property *received* or owned by it, and all transactions relating to such income or property, shall be exempt from all Federal, State, and local taxation

	with respect thereto.”
22 U.S.C. § 2124c(j)	“The Foundation and any *income* or property *received* or owned by it, and all transactions relating to such income or property, shall be exempt from all Federal, State, and local taxation with respect thereto.”
16 U.S.C. § 916c(a)	“It shall be unlawful for any person … (2) to ship, transport, purchase, sell, offer for sale, import, export, or have in possession any whale or *whale products* taken or *processed* in violation of the [International Convention for the Regulation of Whaling], or of any regulation of the Commission, or of this subchapter, or of any regulation of the Secretary of Commerce ….”
20 U.S.C. § 1067j(b)	“The Secretary shall establish procedures for reviewing and evaluating *grants* and contracts *made* or entered into under such programs. Procedures for reviewing grant applications, based on the peer review system, or contracts for financial assistance under this subchapter may not be subject to any re-

view outside of officials responsible for the administration of the Minority Science and Engineering Improvement Programs."

12 U.S.C. § 1735e-1 "In the administration of housing assistance programs, the Secretary of Housing and Urban Development shall encourage the use of *materials* and products *mined* and *produced* in the United States."

Appendix C

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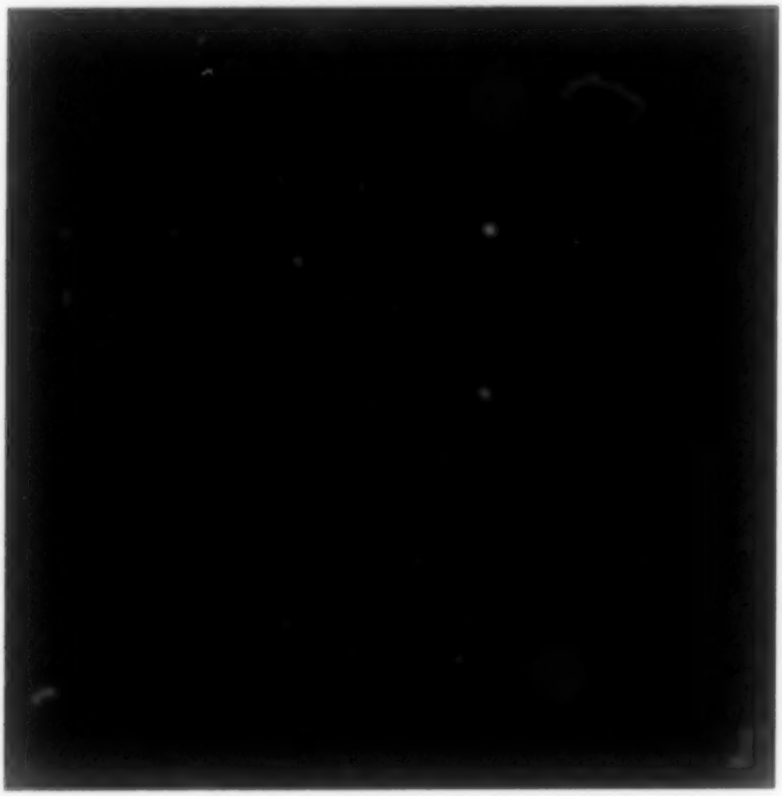

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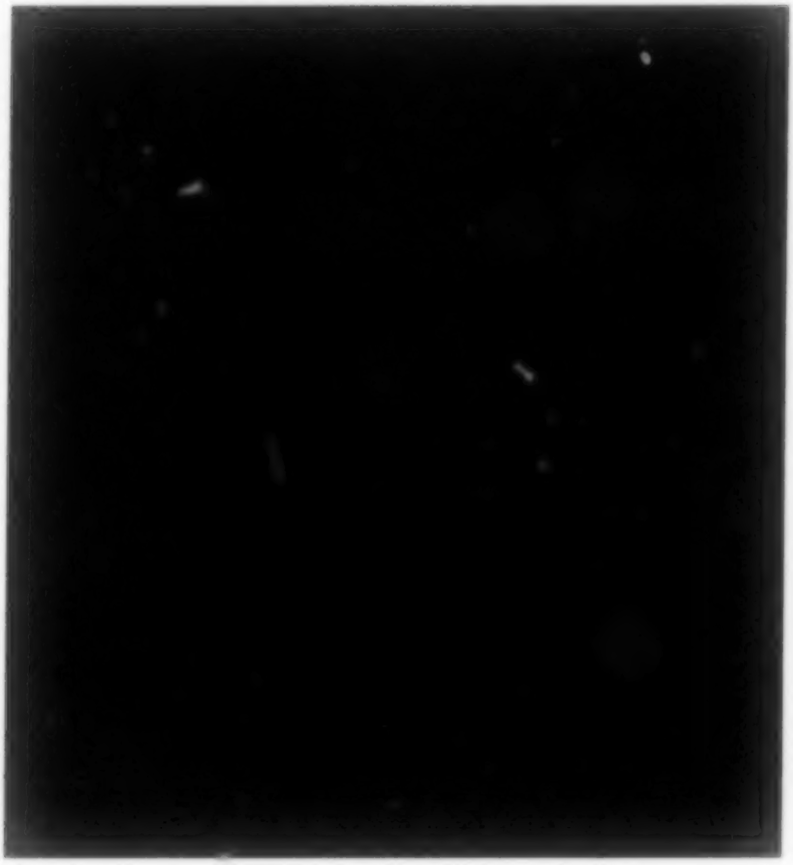

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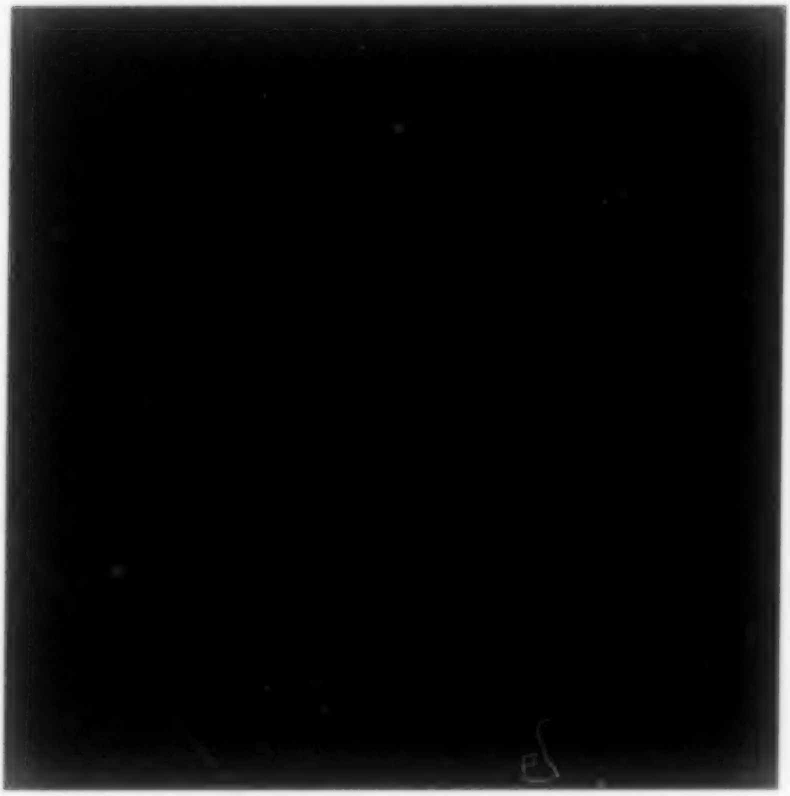

No. 16-1362

In the
Supreme Court of the United States

ENCINO MOTORCARS, LLC,

Petitioner,

v.

HECTOR NAVARRO, MIKE SHIRINIAN, ANTHONY PINKINS, KEVIN MALONE, REUBEN CASTRO,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR PETITIONER

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January 8, 2018

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REPLY BRIEF

The Fair Labor Standards Act (FLSA) exempts from its overtime-pay requirements "any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles." 29 U.S.C. §213(b)(10)(A). Service advisors are clearly salesmen: they "interact with customers and sell them services for their vehicles." *Encino Motorcars, LLC v. Navarro* (*Encino I*), 136 S. Ct. 2117, 2121 (2016). Service advisors are also primarily engaged in servicing: they spend their workdays "sell[ing] services," "recording service orders," and "explaining the repair and maintenance work." *Id.* at 2122. Because service advisors are "salesm[e]n" primarily engaged in "servicing automobiles," they are exempt. Even the Ninth Circuit conceded that §213(b)(10)(A)'s literal, disjunctive terms encompass service advisors.

Respondents jump through hoops in an attempt to evade the statute's literal terms. For example, Respondents invoke the *expressio unius* canon based on their repeated and question-begging assertion that §213(b)(10)(A) includes "three and only three" occupations. But that argument is premised on an agency "handbook" that Congress never considered and this Court has never cited. In reality, the statute does not exempt just three itemized occupations, but includes broader language that exempts salespeople primarily engaged in selling *or* servicing automobiles, which plainly encompasses service advisors. Respondents resist that conclusion by denying that service advisors are "salesmen." But that novel claim conflicts with *Encino I* and the allegations of Respondents' own complaint.

Respondents undertake elaborate efforts to define "servicing" narrowly. Not only do those definitions lack grounding in the statutory text; they would carve partsmen right out of the exemption, despite Congress' undeniable intent to exempt partsmen. While Respondents belatedly try to accommodate partsmen (on page 41 of a 50-page brief), all but the least-plausible and most-gerrymandered of their late-breaking expansions of "servicing" would exempt service advisors as well. In reality, Congress defined servicing broadly enough to capture partsmen *and* service advisors, both of whom are primarily engaged in servicing without spending their days under the hood.

Respondents dust off an antiquated interpretive canon and invoke a laundry list of inapposite statutes to resist this plain-language and common-sense interpretation, but none of that changes the reality that there are approximately 100,000 service advisors engaged in servicing automobiles who fall comfortably within the exemption's plain terms. Respondents downplay "decades of industry reliance," *Encino I*, 136 S. Ct. at 2126, by invoking inadequate substitutes for §213(b)(10)(A)'s readily-administered exemption and implausibly contending that reversing the Ninth Circuit's alone-in-the-Nation decision would cause disruption. In reality, reversal would avoid disruption by reaffirming the *status quo ante* that has governed for nearly fifty years and by ensuring comparable treatment of all three key members of the servicing triad, rather than giving the highest paid of the three an unjustified windfall.

I. Section 213(b)(10)(A) Unambiguously Exempts Service Advisors.

A. Service Advisors Are "Salesmen."

Respondents start their lead *expressio unius* argument on the same wrong foot on which the Ninth Circuit began its opinion: they invoke the Occupational Outlook Handbook ("OOH") to claim that "Congress chose to exempt three and only three specific occupations" in §213(b)(10)(A), and service advisor is not one of them. Resp.Br.8. Remarkably, given the OOH's centrality to their lead argument, Respondents offer no answer to the myriad problems with OOH reliance detailed in Petitioner's brief. *See* Pet.Br.36-37. Never mind that there is absolutely no evidence in the legislative history or elsewhere that Congress considered the OOH in enacting or amending §213(b)(10)(A), or that no member of this Court has ever cited the OOH, let alone relied on it in interpreting the FLSA. *Id.* Respondents' silence is striking and confirms that Congress did not merely "itemize" three "specific occupations" listed in the OOH. Resp.Br.13.[1]

Instead, Congress broadly exempted "*any* salesman, partsman, or mechanic primarily engaged in selling *or* servicing automobiles." §213(b)(10)(A) (emphases added). Broadening terms like *any* and *or* confirm that §213(b)(10)(A) exempts salespeople beyond those who sell automobiles and that efforts to limit the exemption to salespeople selling automobiles are "flatly contrary to the statutory text." *Walton v. Greenbrier Ford, Inc.*, 370 F.3d 446, 451 (4th Cir. 2004) (Gregory, J.).[2]

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[1] The 1966 OOH lists "automobile body repairmen" as a separate occupation, Pet.App.9, yet DOL has from the beginning treated body repairmen as exempt. *See* DOL Wage and Hour and Public Contracts Division, Opinion Letter (Mar. 7, 1968). That confirms there is simply no three-to-three correspondence between OOH job titles and occupations exempted by the broader text of §213(b)(10)(A).

Respondents are forced to resort to the extreme claim that service advisors, a.k.a., "service salesmen," 29 C.F.R. §779.372(c)(4) (1971), are not "salesmen." Resp.Br.14-15. Even the Ninth Circuit did not go that far. *See* Pet.App.38 (conceding "a service advisor qualifies ... as a 'salesman'"). And with good reason, as Respondents' novel argument disregards both *Encino I* and Respondents' own complaint.[3]

This Court observed in *Encino I* that service advisors "interact with customers and sell them services for their vehicles," 136 S. Ct. at 2121, noted that "a service advisor sells repair and maintenance services," *id.* at 2122, and referred to "dealership employees who sell services (that is, service advisors)," *id.* at 2127. Those statements were not mere commentary: the Court faulted DOL's 2011 regulation for failing, *inter alia*, to adequately explain its distinction between "dealership employees who sell vehicles" and "dealership employees who sell services (that is, service advisors)." *Id.*

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[2] Respondents deny that "any" is a term of breadth. Resp.Br.18. But this Court has repeatedly held the opposite, including in the FLSA context, *e.g.*, *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 162 (2012), and Respondents' own authority recognized "any" as a "broad term[]," albeit one that did not modify the critical word at issue there, *BP Am. Prod. Co. v. Burton*, 549 U.S. 84, 93 (2006). While context may sometimes qualify the term's inherent breadth, Respondents identify no such "context" here.

[3] Respondents' "not-even-a-salesman" argument was not raised at any previous point in these proceedings, including *Encino I*. *See OBB Personenverkehr AG v. Sachs*, 136 S. Ct. 390, 397-98 (2015) ("[W]e will not entertain arguments not made below.").

Respondents acknowledge this, but implausibly suggest that selling is incidental to "the fundamental job of a service advisor," which, they claim, "is to advise and to transmit information, not to sell." Resp.Br.14. That argument ignores both reality and Respondents' own complaint. An effective service advisor, like an effective automobile salesperson, no doubt excels at advising customers and communicating with them. But if Respondents spent their whole day advising customers without selling them servicing, they would earn nothing.

In reality, as the complaint underscores, Respondents' principal activities and the entire basis for their compensation involve "solicit[ing] and suggest[ing]"—*i.e.,* selling—servicing. JA55-56. They "solicit and suggest[] ... that service be conducted on the vehicle to remedy the complaints of the vehicle owner." JA55. They then "solicit and suggest ... supplemental service ... above and beyond ... the initial complaints." JA55. Indeed, they "solicit and suggest to the vehicle owner, as many repairs to the vehicle as possible." JA56. If someone who is employed to "solicit and suggest" servicing, and whose success at solicitation dictates their compensation, is not a "salesman," it is hard to imagine who is.[4]

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[4] Of course, service advisors are salespeople whether selling the initially-requested service or "up-selling" additional services. Thus, Respondents' effort to liken service advisors to workers

B. Service Advisors Are Primarily Engaged in Servicing Automobiles.

Service advisors are not just salesmen, but are "primarily engaged in ... servicing automobiles." As this Court recognized in *Encino I*, service advisors, along with partsmen and mechanics, are "[a]mong the employees involved in providing repair and maintenance services." 136 S. Ct. at 2121. Specifically, service advisors are the salesmen dedicated to the dealership's service side, which typically generates more profit than vehicle sales. *See* Pet.Br.28. Indeed, "[n]o position is more crucial to the vehicle service function than the Service Advisor." NADA.Br.7.

The Ninth Circuit resisted the straightforward conclusion that service advisors are "primarily engaged in ... servicing automobiles" by injecting the words "actually" or "personally" into §213(b)(10)(A) to modify "servicing." Pet.Br.39. Respondents stop short of affirmatively embracing that maneuver, suggesting that the Ninth Circuit used "personally" only once, and that "actually" is "implicit" in the statute. Resp.Br.28. But Respondents' own efforts to narrow the scope of servicing are every bit as atextual and

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engaged in "incidental" sales, like a flight attendant who sells passengers food or a dental hygienist who suggests a tooth-whitening procedure, is inapt. Flight attendants, as they will remind you, are primarily there for passengers' safety, not for food sales. Similarly, a dental hygienist primarily cleans teeth. By contrast, whether selling or up-selling, the primary job of service advisors (and often the entire basis for their compensation) is selling services.

problematic, especially given Congress' conceded intent to exempt partsmen.

Respondents offer a variety of narrow definitions for "servicing," including (1) "automotive manual labor, quintessentially maintenance or repairs," (2) "maintain[ing] or repair[ing] automobiles," and (3) "perform[ing] ... mechanical operations on [an automobile]." Resp.Br.19-21. But not one has any grounding in §213(b)(10)(A)'s text. To the contrary, these definitions, derived from inapposite statutes, simply underscore that Congress knows how to give servicing a narrow compass, *see, e.g.*, 2 U.S.C. §2025(b) (defining "servicing" as "the washing and fueling of [a] vehicle, the checking of its tires and battery, and checking and adding oil"), and did not do so in §213(b)(10)(A).

More important, even assuming servicing involves maintaining and repairing automobiles, the question remains whether an employee must maintain or repair the vehicles "personally"—or, to use Respondents' new term, "manually." And it is clear that Congress did not intend such a requirement, because it not only omitted such adverbs from §213(b)(10)(A), but also exempted partsmen, who do not themselves actually, personally, or manually perform "maintenance or repairs" on automobiles. As the Court previously observed, partsmen "obtain the vehicle parts needed to perform repair and maintenance and provide those parts to the mechanics." *Encino I*, 136 S. Ct. at 2122 (citing 29 C.F.R. §779.372(c)(2)). Mechanics, by contrast, are the ones who "perform the actual repair and maintenance work," *id.* (citing 29 C.F.R. §779.372(c)(3)), as

Respondents acknowledge, *see* Resp.Br.21 ("it is the mechanic ... who repairs automobiles").

Accordingly, the fundamental problem with Respondents' effort to narrow the scope of servicing is that servicing cannot be interpreted so narrowly as to require personal, actual, or manual maintenance or repair work without excluding partsmen. And the one thing no one can dispute is that Congress intended to exempt partsmen.

Respondents try to obscure this fundamental problem by deferring their discussion of partsmen until page 41, long after their principal argument for a narrow construction of servicing. Although the problem can be deferred, it cannot be avoided. Once Respondents get around to addressing partsmen, they end up broadening the definition of servicing sufficiently that it would fairly capture service advisors as well. At best, Respondents provide a scattershot listing of potential characteristics that *might* distinguish *some* partsmen from *some* service advisors. For example, they argue that "some" partsmen "may" have "grease under their fingernails," "work with their hands," wear no tie to work, or "work in the back" of a dealership. Resp.Br.41, 44. There are multiple problems with this submission.

First, not one of Respondents' proffered tests has any grounding in the statute. Nothing in §213(b)(10)(A)'s text suggests that Congress cared about the amount of grease under anyone's fingernails or their fashion sense or whether they "work in the back" or front of the dealership.

Second, Respondents' efforts contradict DOL regulations, which define a partsman as an employee "primarily engaged in requisitioning, stocking, and dispensing parts." 29 C.F.R. §779.372(c)(2). Even if "some" partsmen occasionally get grease under their nails or "test, repair, and customize parts," Resp.Br.42-43, those activities are neither the defining features of partsmen nor what they are *primarily engaged in*. Respondents' only answer is to complain that Petitioner is relying on "the very DOL regulation that it persuaded this Court to invalidate as inadequately reasoned." Resp.Br.43-44. Not so. Petitioner never questioned *the "partsman" definition*—which has been on the books without change or controversy since 1970—and this Court did not invalidate it in *Encino I*. Rather, Petitioner affirmatively embraced the regulatory definition of partsmen in *Encino I*, *see* Reply Br. for Pet'r (No. 15-415) at 14 n.3, 15, to attack the unduly narrow regulatory definition of salesman, and this Court invalidated only the latter, while citing the DOL "partsman" definition with approval, *see* 136 S. Ct. at 2122-23 (citing 29 C.F.R. §779.372(c)(2)).

Third, if partsmen were sufficiently engaged in "test[ing], repair[ing], and customiz[ing] parts," Resp.Br.42, to come within the scope of the exemption, there is no reason why a service advisor's responsibilities would not equally satisfy the statute. Both the partsman and the service advisor are unquestionably *engaged in* the servicing of automobiles even though neither is "manually" or "personally" performing "maintenance or repair" on customer vehicles.

Undeterred, Respondents cite a single NLRB decision to claim that partsmen "perform automotive manual labor" because they "hand parts directly to mechanics over a counter or in the service bay." Resp.Br.43. But unlike in a relay race, there is nothing critical here about handing things directly to a mechanic. Whether service advisors manually pass a service form or physically hand over the automobile (rather than leave those ministerial tasks to others), they perform tasks far more integral to servicing than merely handing over a part like a baton. Service advisors work closely with mechanics throughout the service process, from the initial maintenance or repair evaluations, to determinations based on customer input about what maintenance or repair the mechanic will perform, to handling customer questions about the mechanics' work. *See Encino I*, 136 S. Ct. at 2121-22; NADA.Br.7. None of that is to denigrate the important role partsmen play in servicing; but it is to say that service advisors are at least as engaged in servicing within the meaning of the statute as partsmen, even though neither routinely works on customer vehicles themselves.[5]

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[5] Respondents' remaining grab bag of textual observations, *see* Resp.Br.22-30, depends on their narrow and atextual definition of "servicing." For example, Respondents contend that "[s]elling services is not the same as servicing," because "[t]here is a fundamental difference between selling someone else's service and performing the service oneself." Resp.Br.9, 21. But emphasizing that the servicing is performed by others is just a backdoor way of saying that service advisors do not perform the service personally. Likewise, Respondents make observations about the scope of "primarily" and "engaged in." Resp.Br.24-28. But the former simply requires workers to spend the majority of their time on exempt activities, so someone who "primarily" does clerical work but spends one afternoon a week as a partsman is not exempt. "Engaged in" is a phrase that, like "any," betokens

C. Respondents' "Distributive Phrasing" Argument Lacks Merit.

1. The Ninth Circuit repeatedly conceded that under a "literal" reading of the statutory text, §213(b)(10)(A) encompasses service advisors. *See* Pet.Br.18-20, 35-38. Respondents nonetheless ask this Court to depart from §213(b)(10)(A)'s literal, disjunctive terms ("selling *or* servicing") on the ground that "salesman" pairs only with "selling," not "servicing." Resp.Br.31; *see* Resp.Br.31-39. That is, Respondents assert that salesman goes only with selling, while partsman and mechanic go only with servicing. Resp.Br.10.

In implicit recognition that or means or and thus the statute's literal, disjunctive language covers salesmen primarily engaged in servicing, Respondents dust off the canon of "*reddendo singula singulis*," which translates to "referring each to each." Respondents summarize the canon (in terms that underscore its tepid nature) as "[f]irst often goes with first, as last often goes with last." Resp.Br.35. And they present a laundry list of other statutes purportedly illustrating the canon. Resp.Br.21-24; Resp.App.B1-B39.

But the statutes for which the *reddendo* canon applies with any force share a critical feature, implicit

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breadth. Respondents focus on the word "deem" in 29 U.S.C. §203(j), but there is no denying that Congress viewed "engaged in production" as broader than "produced," as it defined the former to include the latter *and other related activities*. Respondents can assert a narrow definition for "engaged in servicing" only by virtue of their artificially narrow definition of servicing.

in the canon's very name, that §213(b)(10)(A) lacks: they all have the *same number* of nouns and verbs, such that *each* noun has a corresponding verb with which to pair. Even when a statute has the same number of nouns and verbs, the *reddendo* canon is far from absolute, and context determines whether the disjunctive nouns couple with multiple disjunctive gerunds or just one. Pet.Br.43-44 (instruction to feed "hungry or barking cats or dogs" would not leave a famished but mute pup unfed). Section 213(b)(10)(A), however, contains three nouns and just two gerunds, thus defeating the precondition for the canon.

In fact, §213(b)(10)(A) includes not only three disjunctive nouns (salesman, partsman, or mechanic), and two disjunctive gerunds (selling or servicing), but three disjunctive objects (automobiles, trucks, or farm implements) as well. It is undisputed that all three disjunctive objects are distributed to all the viable noun-gerund combinations; no one would suggest, for example, that only farm-implement mechanics (the last with the last) and not automobile and truck mechanics are exempt. The idea is frivolous.[6] That

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[6] It is equally frivolous to draw any inference from the unique work patterns of farm-implement partsmen because partsmen were supposedly added to §213(b)(10)(A) "to accommodate the[] concerns of farm-implement dealers." Resp.Br.44-45. While an early proposal would have exempted only "partsmen primarily engaged in selling or servicing farm implements," H.R. 13,712, 89th Cong. §209(b) (ordered to be printed by Senate, Aug. 26, 1966), the text ultimately adopted more broadly exempts "any ... partsman ... engaged in ... selling or servicing automobiles, trucks, or farm implements." 29 U.S.C. §213(b)(10)(A). While not enacted, the earlier proposal's pairing of partsmen with "selling *or* servicing" does undermine the notion that Congress intended partsman (and mechanic) to go exclusively with

Respondents nonetheless invoke *reddendo* as to the noun-gerund combinations, but not the objects, underscores the oddity of their argument. They contend that *reddendo* governs half the subsection, with normal plain-language, "or-means-or" principles governing the other half. The far more sensible course (and the one far more likely to capture Congress' actual intent) is to follow the plain text for the entire subsection and honor any combinations of disjunctive nouns, verbs, and objects that exist in the real world.

Respondents' 53 examples of disjunctive statutes containing different numbers of nouns and verbs reaffirm the wisdom of following the plain text. Take, for example, 43 U.S.C. §952, which permits "[a]ny person, livestock company, or transportation corporation engaged in breeding, grazing, driving, or transporting livestock" to construct reservoirs. Respondents single out this provision as a shining example of *reddendo* because "the third subject, 'transportation corporation,' pairs only with the third and fourth gerunds, 'driving' and 'transporting,' not 'breeding' or 'grazing.'" Resp.Br.36. But this provision well illustrates *reddendo*'s limitations, especially where there are unequal numbers of nouns and gerunds. The third subject, "transportation company," is not the *only* subject that pairs with the third and fourth gerunds; the first two subjects, "person" and "livestock company," do so as well. That flatly violates the *reddendo* canon, under which the first two subjects

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servicing, which is the indispensable premise of Respondents' *reddendo* argument.

should pair only with the first two gerunds, not with all four.

Indeed, Respondents' hand-picked example ends up defeating their own argument about §213(b)(10)(A). Respondents invoke *reddendo* to argue that the fact that the second and third nouns (partsman and mechanic) sensibly pair only with the second gerund (servicing) implies that the first noun (salesman) pairs *only* with the first gerund (selling). But Respondents' own example contradicts that pattern. Even though the last noun (transportation company) sensibly pairs only with the last two gerunds (driving and transporting), the first two nouns pair with all four gerunds. That is the functional equivalent of salesman pairing with both selling and servicing, which, of course, is *Petitioner's* argument.

This is not an isolated example. Respondents implicitly concede that the default grammatical rule, and not *reddendo*, applies in nearly all of the 53 statutes they identify. Respondents highlight (quite literally) this concession in their Appendix B by using different notations (*e.g.*, underlining and bolding) to illustrate when particular nouns pair with particular verbs (*e.g.*, underlining both the noun and verb when they pair). Thus, the telltale sign in Appendix B that a statute conforms to the default grammatical rule, and not *reddendo*, is when a word is modified in two (or more) ways (*e.g.*, underlined *and* italicized). In those instances, nouns pair with more than one verb (or vice versa), so that each sensible noun-verb combination is given effect. *See* Resp.App.B3-B19.

2. Respondents invoke *United States v. Simms*, 5 U.S. (1 Cranch) 252 (1803), as an example of this Court's use of *reddendo*. *See* Resp.Br.34-36. It is no accident that Respondents must reach back that far to find an example, as the canon has largely lapsed into desuetude. It last appeared in a Supreme Court decision in a 1918 *dissent*, *Sandberg v. McDonald*, 248 U.S. 185, 204 (1918) (McKenna, J., dissenting), and was last mentioned in a majority opinion in 1896, *Atl. & Pac. R.R. v. Laird*, 164 U.S. 393, 400 (1896).

Simms invoked *reddendo* only in passing (in the opinion's penultimate sentence) and is in all events readily distinguishable. The statute there provided that in the newly-formed, ten-miles-square District, "penalties ... accruing *under the laws of ... Maryland and Virginia*, ... shall be recovered ..., *by indictment or information* ..., or *by action of debt*." *Simms*, 5 U.S. at 254 (emphases added). The United States brought an indictment in Alexandria even though Virginia law did not authorize indictments, but only an "action of debt." *Id.* at 255. This Court upheld dismissal of the indictment, understandably concluding that Congress did not intend to create a novel remedy under Virginia law, especially given related statutes requiring the preservation of Virginia law in the portion of the District ceded by Virginia. *Id.* at 257-59.

Simms illustrates what happens when a particular combination of words in disjunctive series produces a null set. In that situation, the basic or-means-or rule does not require the *creation* of something new. But where the combinations do exist, there is no basis to ignore them or the statute's literal language. If Virginia law *had* permitted recovery by indictment, or Maryland *had* permitted recovery by indictment, information, and action for debt, all the extant actions could have proceeded.

The same principle holds true for §213(b)(10)(A). Mechanics and partsmen selling automobiles are not extruded from the exemption because of some dusty canon or obscure grammatical rule. They are not covered simply because they do not exist. They are the equivalent of a Virginia indictment or a barking cat. The problem for Respondents is that while there are no mechanics or partsmen selling automobiles, there are *100,000* salesmen primarily engaged in servicing automobiles—service advisors.

Respondents repeatedly insist that *reddendo* depends not on null sets or extant combinations, but on context. *See, e.g.*, Resp.Br.37. But the relevant "context" here is these 100,000 flesh-and-blood examples of "salesmen" primarily engaged in "servicing automobiles." There is nothing in the *reddendo* canon, especially in the lukewarm, context-specific form advocated by Respondents, that justifies treating 100,000 service advisors who come within the literal terms of the §213(b)(10)(A) exemption as non-exempt.[7]

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[7] Respondents posit (at 38) that a track meet promising a prize to "any runner, long jumper, or high jumper for excelling in running or jumping" would not award a medal to a mediocre high jumper with a particularly fast approach. But that is because success in the high jump is judged by the height of the jump. If the same track meet refused to award medals for its hurdling events on a *reddendo* theory—*i.e.*, no medals for runners who excelled at jumping—they would have a riot on their hands. Once again, the lesson that emerges even from Respondents' own examples is that *reddendo* does not justify ignoring significant

3. Respondents invoke multiple grammar guides, but none supports their strained interpretation. Resp.Br.33. For example, Respondents claim that Scalia & Garner "approv[e] of" *reddendo*, but that is a stretch; they simply acknowledge it, and only for (1) sentences that include equal numbers of words in the first and second lists; and (2) sentences that include a word signaling each-to-each phrasing ("each," "every," etc.)—neither of which describes §213(b)(10)(A). Antonin Scalia & Bryan Garner, *Reading Law* 214-16 (2012). The Singer treatise notes that "[c]ourts typically apply *reddendo singula singulis* when a section's opening words are general and the succeeding parts are specific," which likewise fails to describe §213(b)(10)(A). 2A Norman Singer et al., *Sutherland Statutes and Statutory Construction* §47:26 (7th ed. Supp. Nov. 2016). And Black's Law Dictionary underscores the canon's obsolescence, noting that it "*was* used as a rule of construction." Black's Law Dictionary 1467 (10th ed. 2014) (emphasis added).

Respondents also invoke Google Books, claiming that a search for "salesman servicing" revealed precious few results. Resp.Br.31-32. Even if Google Books were a sound interpretive guide, this particular search is unavailing. Service advisors are salesmen primarily engaged in servicing automobiles because they sell the servicing of automobiles. Nothing in Google Books or any other source suggests that there is anything anomalous about salespeople selling

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numbers of a pairing literally covered by the text's disjunctive phrasing, whether hundreds of running-and-jumping hurdlers or 100,000 selling-and-servicing service advisors.

services rather than goods (like automobiles). In fact, a Google Books search for "sell services" yielded 23,200 results, and a search for "'sell services' 'service advisor'" did not return a null set, but, *inter alia*, the explanation that "[t]he Service Advisor is responsible for ... selling the technicians' time." Roger Weissman, *Becoming an Automotive Service Advisor* 17 (2010). Finally, as with Respondents' other arguments, their Google-search argument fails to account for the statute's undoubted coverage of partsmen. The Google Books database search for "partsman servicing" contains exactly one (irrelevant) hit, but that hardly suggests that partsmen are non-exempt.

D. Legislative History Does Not Aid Respondents.

After deeming it "inconclusive" the first time around, Pet.App.70, the Ninth Circuit took another look and concluded that the legislative history "strongly suggests" that §213(b)(10)(A) does not encompass service advisors. Pet.App.21 n.14. That change well illustrates that the search for "friends in the crowd" of legislative history depends on how hard and how far afield one looks. *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005). Tellingly, Respondents do not mention, much less defend, a good portion of the Ninth Circuit's "history," including statements by non-legislators and from hearings that yielded no legislation. *See* Pet.Br.47-48. What little legislative history Respondents do embrace is unrevealing, and certainly insufficient to override the unambiguous statutory text.

The only legislative history that Respondents invoke from the 1966 enactment of the relevant language comprises a handful of floor statements noting that salesmen, partsmen, and mechanics "often had to work unpredictable hours," and "sometimes work off-site." Resp.Br.46-47. None of those statements focused on service advisors. Instead, they came during a Senate debate about whether to exempt partsmen in addition to salesmen and mechanics. And even as to partsmen, the legislative history is inconsequential. Respondents cannot plausibly contend that the exemption reaches only the subset of partsmen who work irregular hours or travel offsite.[8]

As for the 1974 amendments, Respondents merely invoke the same two-sentence "summary" the Ninth Circuit cited, without responding to its limitations. *See* Pet.Br.47. "The 1974 FLSA amendments had no effect on the text pertinent to car dealerships," which was enacted in 1966. Pet.App.6. That explains why the DOL regulations date to 1970 and why Respondents' *amici* dismiss the 1974 Amendments as "not germane." NELA.Br.11 n.3. The 1974 amendments instead narrowed the exemption for trailer, boat, and aircraft dealerships (not automobile dealerships) to "any salesman primarily engaged in selling" those vehicles. Pub. L. No. 93-259, §14, 88 Stat. 55, 65 (1974). Respondents speculate that by removing the words "partsman" and "mechanic" and the phrase "or servicing" for trailer, boat, and aircraft dealerships *in 1974*, Congress underscored its intent to pair "salesman" only with "selling" in the *1966 automobile dealership exemption*. Resp.Br.39-40. That theory "sounds absurd, because it is." *Sekhar v. United States*, 133 S. Ct. 2720, 2727 (2013). Even if the 1974 amendment were somehow relevant, it reflects only a congressional intent to treat all three members of the servicing triad the same and make all three non-exempt at trailer, boat, and aircraft dealerships. That Congress made no comparable changes to §213(b)(10)(A) strongly indicates that at automobile dealerships, all three remain exempt.

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[8] Earlier versions of the legislation would have exempted "any salesman or mechanic employed by" an automobile dealership and thus unquestionably would have exempted service advisors. *E.g.*, H.R. 13,712 at 14-15, 89th Cong., §209 (as introduced in House, Mar. 16, 1965). Although the legislative history, unlike the statutory text, is opaque, there is no indication that in adding "partsmen" to the exemption, Congress had any intent to oust service advisors.

E. Respondents Do Not Meaningfully Defend the Anti-Employer Canon.

Respondents (and their *amici*) invoke the so-called "FLSA canon," which purportedly calls for the statute's exemptions to be construed "narrowly." Resp.Br.16 (quoting *Mitchell v. Ky. Fin. Co.*, 359 U.S. 290, 295 (1959)); *see* NELA.Br.15-27. But they do not respond to any of the methodological problems with that "rule." *See* Pet.Br.49-50; Chamber.Br.5-15. Indeed, by claiming that the "FLSA canon" applies only to "exemptions to the FLSA," Resp.Br.16-17, they simply underscore the canon's incoherence. *See* Pet.Br.50 n.15. When it enacted interrelated operative provisions, definitions, and exemptions, Congress presumably intended all of them to be interpreted fairly and correctly, rather than having some interpreted according to the ordinary rules and others artificially narrowed.

Respondents suggest otherwise based on the notion that such canons held greater sway back in

1966 and 1974. Resp.Br.16-17; *see also* NELA.Br.26-27. But that is not how statutory interpretation works. This Court does not maintain and apply interpretive almanacs indicating which statutory interpretation principles were *au courant* during each congressional session. Instead, this Court adopts coherent and consistent principles for interpreting the United States Code, and if it rejects an interpretive method as inconsistent with those fundamental principles, it rejects the invitation to give the discarded method "one last drink." *Alexander v. Sandoval*, 532 U.S. 275, 287 (2001); *see id.* at 282-92.

The so-called FLSA canon has distorted lower court decision-making for decades. *See* NELA.Br.22 n.6. Lower courts view themselves as "bound" to apply it unless and until this Court tells them otherwise. Pet.App.20-21. The time has come to inter it once and for all and reaffirm that FLSA exemptions, like all statutory language, should be interpreted neither narrowly nor broadly, but fairly and correctly in accord with their plain meaning. Pet.Br.48-50; Chamber.Br.5-15.

II. Respondents Disregard Forty Years Of Reliance Interests.

In *Encino I*, this Court acknowledged the "decades of industry reliance" on DOL's longstanding acquiescence in an unbroken series of cases holding service advisors exempt. 136 S. Ct. at 2126. Noting the "serious reliance interests at stake," the Court observed that "[d]ealerships and service advisors negotiated and structured their compensation plans against this background understanding." *Id.* at 2126-27. The Ninth Circuit's anomalous decision—the first to hold that service advisors are *not* exempt under §213(b)(10)(A)—quite obviously implicates those same "serious reliance interests" and this Court's repeated concern with imposing massive retroactive liability on long-settled industry practices, *e.g.*, *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 158 (2012). *See* Pet.Br.51-53.

Without even attempting to grapple with the Court's language from *Encino I* or its precedents disfavoring exactly this sort of claim, Respondents suggest that discarding over forty years of precedent and practice "will not unsettle expectations or disrupt the dealership industry," because dealerships can invoke 29 U.S.C. §207(*i*) and 29 U.S.C. §259. Resp.Br.48. Respondents' contention lacks merit.

First and foremost, Respondents made the same argument in *Encino I*, and this Court still recognized that dealerships had "serious reliance interests" and could "face substantial" FLSA liability "*even if* this risk of liability may be diminished in some cases by the existence of a separate FLSA exemption for certain employees paid on a commission basis, see §207(*i*), and *even if* a dealership could defend against retroactive liability by showing it relied in good faith on the prior agency position, see §259(a)." 136 S. Ct. at 2126 (emphases added). Respondents ignore this language, preferring instead a concurring footnote suggesting DOL might be able to overcome reliance concerns in a new rulemaking. Resp.Br.49 (citing 136 S. Ct. at 2128 n.2 (Ginsburg, J., concurring)).

The majority opinion was correct—neither §207(*i*) nor §259(a) is an adequate substitute for §213(b)(10)(A). While §213(b)(10)(A) applies to *all* salesmen primarily engaged in servicing (*i.e.*, all service advisors), §207(*i*) applies *only* to workers (a) employed in "a retail or service establishment"; (b) earning a "regular rate of pay ... in excess of [150%] the minimum hourly rate" prescribed by the FLSA's minimum wage provision; and (c) receiving "more than half [their] compensation" from commissions. 29 U.S.C. §207(*i*). Given those requirements, §207(*i*)'s exemption "will be unavailable to a significant portion of the nation's dealerships," including those providing service advisors "more generous base compensation" or deriving over 25% of revenue from non-retail sales. NADA.Br.14-15.

As for §259(a), that provision would require a dealership to "plead[] and prove[]" the "defense" that it relied "in good faith" on a DOL "regulation, order, ruling, approval, or interpretation" exempting service advisors. 29 U.S.C. §259(a). Because §259(a) is an affirmative defense, dealerships could not obtain dismissal on a motion to dismiss (unlike under §213(b)(10)(A)), subjecting them to burdensome discovery. Furthermore, the affirmative defense would be complicated by the fact that, especially in the wake of DOL's 2011 flip-flop-flip, dealerships have been relying on decades of judicial precedents, but not an extant DOL regulation.[9]

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[9] DOL recently underscored the current lack of definitive regulatory guidance concerning service advisors by announcing it would suspend any enforcement actions while awaiting this Court's decision. *See* DOL Wage and Hour Division, Field Assistance Bulletin No. 2018-1 (Jan. 5, 2018), http://bit.ly/2EeTHkI.

And nothing in §259(a) would obviate the need to restructure employment relationships going forward in ways that may leave both employer and employee worse off. For example, an employee who prefers to receive the majority of her compensation in salary and an employer who wants to treat service advisors comparably to partsmen and mechanics for overtime would be at loggerheads, because the §207(*i*) exemption requires workers to receive over half their compensation in commissions and the §259(a) defense provides no relief prospectively.

Respondents concede that service advisors by necessity work longer hours than mechanics and partsmen because they are integral to both the intake and re-delivery process. *See* Resp.Br.47. Yet Respondents would make non-exempt the member of the servicing triad for whom an exemption is most appropriate. And they would simultaneously give the best-paid member of the triad an unjustified windfall. *See* Pet.Br.54 (explaining that service advisors are already better compensated than partsmen and mechanics). Such a result not only upsets settled expectations but introduces divisive and unjustified distinctions among employees working side-by-side.

Finally, Respondents implausibly contend that confirming four decades of precedent and practice treating service advisors as exempt would "greatly disrupt" the industry. Resp.Br.49-50. This argument beggars belief. For over *forty years*, it has been the universal view of every court to consider the question that service advisors are exempt—even in the context of DOL enforcement actions where the agency would have enjoyed some deference. As this Court recognized in *Encino I*, that is the legal backdrop against which dealerships have operated for decades. Dealers have had no difficulty classifying salespeople who sell neither automobiles nor servicing (*e.g.*, warranty salespeople), or employees engaged in servicing who are not salesmen, partsmen, or mechanics (*e.g.*, car porters). Reversing the Ninth Circuit would do nothing more than preserve the longstanding *status quo*. By contrast, affirming the Ninth Circuit would effect a sea change in the law, put thousands of dealerships across the country at risk for retroactive damages, upend employee compensation pay packages, and needlessly divide servicing employees. Pet.Br.34, 53-54; NADA.Br.15-17.

CONCLUSION

The Court should reverse the judgment of the Ninth Circuit.

Respectfully submitted,

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January 8, 2018

No. 16-1362

IN THE
Supreme Court of the United States

ENCINO MOTORCARS, LLC,
Petitioner,

v.

HECTOR NAVARRO; MIKE SHIRINIAN; ANTHONY PINKINS; KEVIN MALONE; AND REUBEN CASTRO,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF LAW PROFESSORS AS *AMICI CURIAE* SUPPORTING RESPONDENTS

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December 8, 2017

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INTEREST OF *AMICI CURIAE*[1]

Amici are law professors who regularly teach and write about employment and labor law.[2] *Amici* have no stake in the outcome of this case other than their scholarly interest in the logical and rational development of the law. Because the proper interpretation of the Fair Labor Standards Act of 1938 ("FLSA") implicates fundamental issues of employment and labor law, *amici* believe that their perspective may assist the Court in resolving this case.

SUMMARY OF ARGUMENT

Petitioner contends that service advisors like respondents are not entitled to overtime pay because "the broader scheme of the FLSA" is to exempt commissioned employees and it is "reasonable for salespeople to be compensated based on their success at selling." Pet. Br. 32-33 (emphasis omitted). Petitioner further contends that an affirmance would upset "longstanding compensation arrangements" based on "long-settled industry practices." *Id.* at 52. The problem with these contentions, however, is that they are subordinate in any legal analysis to the FLSA's text, structure, and purpose. As the Ninth Circuit recognized in this case, the FLSA's text, structure, and purpose lead to the conclusion that service advisors like respondents are entitled to overtime pay.

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[1] The parties have consented to the filing of this brief, and letters expressing their blanket consent to the filing of *amicus* briefs have been filed with the Clerk. Pursuant to this Court's Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici* and their counsel made a monetary contribution intended to fund the preparation or submission of this brief.

[2] A full list of *amici*, including their institutional affiliations, is set forth in the Appendix to this brief.

I. Congress enacted the FLSA in 1938 to offer employees throughout this country legal protections that were expansive and in many respects revolutionary. For example, the FLSA for the first time declared a national minimum wage, forbade the use of child labor, established maximum hours that workers could remain on the job each week, and mandated overtime pay for hours on the job in excess of the maximum. Fair Labor Standards Act of 1938, ch. 676, §§ 6, 7, 12, 52 Stat. 1060, 1062-64, 1067; *see* 29 U.S.C. §§ 206, 207, 212. This Court recognized the ambition and significance of the FLSA early on, noting that it endeavored "to eliminate, as rapidly as practicable, substandard labor conditions throughout the nation." *Powell v. U.S. Cartridge Co.*, 339 U.S. 497, 510 (1950).

II. The FLSA is designed to apply to all employees — including commissioned employees and salespersons — who are not expressly exempted. Accordingly, the scope of the FLSA's overtime protection is broad, *see* 29 U.S.C. § 207(a)(1), and the exemptions to its coverage are "narrow and specific." *Powell*, 339 U.S. at 516. This Court has understood that "[s]uch specificity in stating exemptions [to the FLSA] strengthens the implication that employees not thus exempted . . . remain within the Act." *Id.* at 517.

III. When Congress intended to exempt commissioned employees and salespersons from coverage under the FLSA, it did so expressly. *See* 29 U.S.C. § 207(i). Likewise, when Congress intended to exempt relatively well-paid employees, it did so expressly. *See, e.g., id.* §§ 207(i)(1), 213(b)(24). But, in the absence of such an express exemption, the nature and amount of an employee's compensation is irrelevant to the question whether the FLSA's overtime provisions apply. *See Jewell Ridge Coal Corp. v. Local No. 6167, United Mine Workers of Am.*, 325 U.S. 161, 167 (1945)

("[E]mployees are not to be deprived of the benefits of the Act simply because they are well paid.").

IV. There is no compelling policy rationale to deviate from the text, structure, and purpose of the FLSA to deny respondents their statutory right to overtime pay. Automobile dealers could not reasonably have expected service advisors to fit within the FLSA's exemption to overtime pay for "any salesman . . . primarily engaged in selling or servicing automobiles [or] trucks," 29 U.S.C. § 213(b)(10)(A), when the Department of Labor's formal regulatory interpretations have instructed otherwise for almost 50 years. *See* 35 Fed. Reg. 5856, 5896 (Apr. 9, 1970) (codified at 29 C.F.R. § 779.372(c)(4) (1971)). Moreover, the FLSA's overtime provisions do not yield to incompatible industry norms. The FLSA was enacted to displace incompatible industry norms, and so it would be perverse to let industry norms prevail in this case.

There is also no fundamental unfairness to petitioner in applying the FLSA's overtime provisions to service advisors like respondents. The Portal-to-Portal Act of 1947 protects against unfair application of the FLSA to actions taken in good-faith reliance on prior agency interpretive statements, *see* 29 U.S.C. § 259, assuaging concerns about unfair retroactive liability. Automobile dealers, like other employers, are obligated to maintain wage-and-hour records necessary to calculate overtime pay, *see id.* § 211(c), eliminating worries about administrative inconvenience. And receiving overtime pay to which they are statutorily entitled is hardly a windfall for service advisors. Indeed, the fact that petitioner and other automobile dealers have avoided paying statutorily mandated overtime to these employees for 50 years is the real windfall in this case.

ARGUMENT

I. THE FLSA APPLIES BROADLY TO ACHIEVE FAR-REACHING AND FAR-SIGHTED OBJECTIVES

Congress enacted the FLSA in 1938 to implement employee protections that were expansive and revolutionary. As this Court has noted, "[t]he Act declared its purposes in bold and sweeping terms," *Powell v. U.S. Cartridge Co.*, 339 U.S. 497, 516 (1950), acting "to eliminate, as rapidly as practicable, substandard labor conditions throughout the nation," *id.* at 510. To achieve those expansive purposes, the FLSA established a national minimum wage, forbade the use of child labor, established maximum hours that workers could work each week, and mandated overtime pay for time worked in excess of the maximum hours. Fair Labor Standards Act of 1938, ch. 676, §§ 6, 7, 12, 52 Stat. 1060, 1062-64, 1067; *see* 29 U.S.C. §§ 206, 207, 212.

Congress intended the FLSA's protections to apply to a broad array of American workers. *See United States v. Darby*, 312 U.S. 100, 109 (1941) (the FLSA "set up a comprehensive legislative scheme"); *Powell*, 339 U.S. at 516 ("Breadth of coverage was vital to [the FLSA's] mission. Its scope was stated in terms of substantial universality . . . ."). Because breadth of coverage was foundational to the Act's purposes, exceptions to coverage "were narrow and specific." *Powell*, 339 U.S. at 517. Indeed, President Franklin D. Roosevelt deemed the FLSA "the most far-reaching, far-sighted program for the benefit of workers ever adopted here or in any other country," "[e]xcept perhaps for the Social Security Act." 1938 PUBLIC PAPERS & ADDRESSES OF FRANKLIN D. ROOSEVELT 392 (Samuel I. Rosenman ed., 1941).

To ensure that the FLSA was implemented as broadly as its purposes and goals required, Congress established expansive record-keeping requirements for employers. *See* 29 U.S.C. § 211. In particular, the FLSA states that "[e]very employer subject to any provisions of this chapter . . . shall make, keep, and preserve such records of the persons employed by him and of the wages, hours, and other conditions and practices of employment maintained by him." *Id.* § 211(c).

II. THE FLSA'S BROAD PROTECTIONS EXTEND TO ALL COVERED EMPLOYEES UNLESS THEY ARE EXPLICITLY EXEMPT, AND THE AMOUNT OF PAY IS NOT RELEVANT UNLESS EXPLICITLY INCLUDED IN A STATUTORY EXEMPTION

By design, the FLSA applies broadly to virtually all employees — including commissioned employees and salespersons — unless they are expressly exempted. The scope of the FLSA's overtime protection is broadly crafted, *see* 29 U.S.C. § 207(a)(1), and the exemptions to this broad coverage are "narrow and specific." *Powell*, 339 U.S. at 516. This Court has stated that "[s]uch specificity in stating exemptions [to the FLSA] strengthens the implication that employees not thus exempted . . . remain within the Act." *Id.* at 517. *Cf. Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 147 (2012). Thus, petitioner's suggestion (at 32-34) that the amorphous "structure and broader purposes" of the FLSA indicate that service advisors[3] were not intended to be covered by the Act is unavailing.

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[3] Respondents are employees who meet and greet customers at automobile dealers, listen to and evaluate their complaints about their vehicles' operations, evaluate their service or repai

A. Commissioned Employees And Salespersons Are Exempt From The FLSA Overtime Rules Only When They Fall Within Explicit Exemptions

When Congress intended to exempt commissioned employees and salespersons from coverage under the FLSA, it did so expressly. For example, Section 7(i) of the FLSA creates an exemption from the Act's general overtime pay coverage for certain retail and service establishments with employees who work on commission. *See* 29 U.S.C. § 207(i). Under Section 7(i), employers do not violate the overtime provisions if they employ an employee in a retail or service establishment in excess of the maximum hours so long as:

> (1) the regular rate of pay of such employee is in excess of one and one-half times the minimum hourly rate applicable to him under section 206 . . . and (2) more than half [the employee's] compensation for a representative period (not less than one month) represents commissions on goods or services.

Id. Similarly, Section 13 exempts certain salespeople from the FLSA's general overtime pay provision. *See Id.* § 213(a)(1), (b)(10)(A)-(B). Section 13(a)(1) exempts "any employee employed . . . in the capacity of outside salesman (as such terms are defined and delimited from time to time by regulations of the Secretary)." *Id.* § 213(a)(1).[4] Section 13(b)(10)(B) exempts "any

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needs, and write up estimates for requested service. This job is variously referred to as service advisor, service manager, or service salesman. Throughout this brief we will refer to the job as service advisor.

[4] An "outside salesman" has been further defined as an employee "[w]ho is customarily and regularly engaged away from the employer's place or places of business in performing [his or her] primary duty," 29 C.F.R. § 541.500(a)(2), and whose primary

salesman primarily engaged in selling trailers, boats, or aircraft, if he is employed by a nonmanufacturing establishment primarily engaged in the business of selling trailers, boats, or aircraft to ultimate purchasers." *Id.* § 213(b)(10)(B). Section 13(b)(10)(A) exempts only "salesm[e]n, partsm[e]n, or mechanic[s] primarily engaged in selling or servicing automobiles." *Id.* § 213(b)(10)(A). Unless this provision can be interpreted as expressly exempting service advisors, they do not become exempt employees based on petitioner's unsubstantiated assertions concerning the "structure and broader purposes" of the Act.

The history of Section 13(b)(10)(A) confirms that it cannot be interpreted as an express exemption for service advisors. Prior to the Fair Labor Standards Amendments of 1966, all employees of automobile dealers were exempted from the FLSA overtime provisions. *See* 29 U.S.C. § 213(a)(19) (1964). But, in 1966, Congress narrowed this exemption to apply to "salesm[e]n, partsm[e]n, or mechanic[s] primarily engaged in selling or servicing automobiles." 29 U.S.C. § 213(b)(10)(A). Importantly, this exemption is narrower than other provisions proposed and rejected by Congress during the 1966 amendment process. For example, one amendment proposed in 1965 would have exempted "*any salesman or mechanic* employed by an establishment which is primarily engaged in the business of selling automobiles, trucks, or farm

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duty is either (i) making "sale[s], exchange[s], contract[s] to sell, consignment[s] for sale, shipment[s] for sale, or other disposition[s]," 29 U.S.C. § 203(k), or (ii) "obtaining orders or contracts for services or for the use of facilities for which a consideration will be paid by the client or customer," 29 C.F.R. § 541.500(a)(1). If an employee is paid on commission but is not an "outside salesman," he is not exempted from the FLSA's minimum wage provision by this provision.

implements to the ultimate purchaser." H.R. 10518, 89th Cong. § 209 (1965) (emphasis added); *see* H.R. Rep. No. 89-871, at 67 (1965). Thus, Congress considered language that would have somewhat narrowed the automobile dealers exemption while still exempting service advisors — who would fall within the category of "any salesman" — but Congress ultimately rejected that formulation. Congress instead adopted language that exempts only certain salesmen employed by automobile dealers — namely, those who are primarily engaged in selling automobiles.

B. An Employee's Annual Income Is Irrelevant In Deciding Whether The Employee Is Exempt From The FLSA's Overtime Provision Unless The Statute Or Regulations Expressly Provide Otherwise

Congress expressly defined the scope of some exemptions from the FLSA's overtime provisions in part by the amount that a worker is paid. *See, e.g.*, 29 U.S.C. §§ 207(i)(1), 213(b)(24). A worker's pay level is also relevant under some of the Department of Labor's regulations. *See, e.g.*, 29 C.F.R. §§ 541.100(a)(1), 541.200(a)(1), 541.300(a)(1). But, in the absence of such an express provision, the amount a worker is paid is irrelevant when deciding whether the FLSA's overtime provisions apply. As this Court has explained, "employees are not to be deprived of the benefits of the Act simply because they are well paid." *Jewell Ridge Coal Corp. v. Local No. 6167, United Mine Workers of Am.*, 325 U.S. 161, 167 (1945).

In suggesting that relatively well-paid workers are not entitled to the statutory protection of the FLSA, petitioner errs (at 34) in focusing on only one of the FLSA's core concerns. To be sure, the FLSA sought to protect workers from inadequate wages — but that was accomplished primarily through the minimum wage provisions. *See, e.g.*, 29 U.S.C. § 206. The overtime provisions were intended to create an incentive for employers to hire more employees, each of whom would work fewer hours, rather than to hire fewer employees working longer hours. *See Walling v. Helmerich & Payne, Inc.*, 323 U.S. 37, 40 (1944) ("[T]he Congressional purpose in enacting Section 7(a) was twofold: (1) to spread employment by placing financial pressure on the employer through the overtime pay requirement, and (2) to compensate employees for the burden of a workweek in excess of the hours fixed in the Act.") (citation omitted).[5] An employee's pay level is irrelevant to that goal.

This Court long has recognized that "an intended effect [of the FLSA] was to require extra pay for overtime worked by those covered by the act even though their hourly wages exceeded the statutory minimum. . . . [The Act] calls for 150% of the regular, not the minimum wage." *Overnight Motor Transp. Co. v. Missel*, 316 U.S. 572, 577 (1942), *superseded on other grounds by statute as stated in Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 128 n.22 (1985); *see also*

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[5] *See also* Ronald G. Ehrenberg & Paul L. Schumann, *The Overtime Pay Provisions of the Fair Labor Standards Act*, *in* THE ECONOMICS OF LEGAL MINIMUM WAGES 266 (Simon Rottenberg ed., 1981) ("[T]hroughout the early 1930s bills were repeatedly introduced into Congress to limit the length of the workweek. While the goal of protecting existing employees from the ills associated with excessive fatigue remained, a second explicit purpose of such legislation was to increase employment by distributing the available work."); Robert D. Lipman et al, *A Call for Bright-Lines to Fix the Fair Labor Standards Act*, 11 HOFSTRA LAB. L.J. 357, 359-60 (1994) ("Congress believed that requiring employers to pay an overtime premium whenever an employee worked over forty hours in a workweek would motivate employers to hire additional workers rather than pay the overtime penalty.").

Warren-Bradshaw Drilling Co. v. Hall, 317 U.S. 88, 93 (1942) (emphasizing that a drilling crew on an oil rig was entitled to overtime compensation despite earning far above the minimum wage). An employee "unless specifically exempted [is] entitled to whatever benefits the overtime provisions confer[]." *Missel*, 316 U.S. at 575. Unless an employee's earnings are part of the definition of an exemption, therefore, they have no bearing on the entitlement to overtime compensation under the FLSA.

The regulations reinforce that principle. For example, 29 C.F.R. § 541.3(a) provides a non-exhaustive list of blue-collar and service workers who "are entitled to minimum wage and overtime premium pay under the [FLSA], and are not exempt under the regulations in this part no matter how highly paid they might be." Those employees are entitled to overtime pay not because of low earnings, but because they worked a high number of hours. Service advisors are in the same position. They are entitled to overtime pay because of how many hours they have worked, not because of how little they are paid. Their pay is simply irrelevant to the exemption claimed.[6]

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[6] This is the case even if the employee earns more than the advisors at issue in this case. For example, in *Gorey v. Manheim Services Corp.*, 788 F. Supp. 2d 200 (S.D.N.Y. 2011), commissioned employees of an automobile auction house were held to be covered by the FLSA overtime provisions, even though some of them made $77,000 per year without overtime — which is more than the $68,995 average that petitioner suggests (at 34) is too high to justify FLSA overtime pay. *See* 788 F. Supp. 2d at 204, 206-09 (holding that employees at issue did not qualify for either outside salesman or administrative exemptions to overtime rules).

III. THE FLSA'S BROAD OVERTIME PROVISIONS ROUTINELY COVER EMPLOYEES WHO RECEIVE COMMISSIONS, AND SUCH COVERAGE DOES NOT PLACE AN UNDUE BURDEN ON EMPLOYERS

Congress expressly exempted some narrowly defined categories of employees from the FLSA's overtime provisions. A few of those categories include commissioned employees. It is therefore a simple task to cite — as petitioner does (at 32) — isolated examples of "individuals engaged in sales or paid on a commission basis" who are also exempt from the FLSA's overtime provisions. But it would be a fallacy to conclude that the express exemption of some commissioned employees justifies a broader exemption of commissioned employees generally.

Petitioner errs in suggesting that employees who satisfy the precise requirements of Section 7(i) or 13(a)(1) of the FLSA are exempt because "the broader scheme of the FLSA" is to exempt commissioned employees or because it is "reasonable for salespeople to be compensated based on their success at selling." Pet. Br. 32-33 (emphasis omitted). Rather, Congress made an explicit policy decision to exempt precisely those employees. Congress easily could have exempted all commissioned employees but chose not to do so. On the contrary, commissioned employees — including highly paid employees — routinely have been subject to the FLSA's overtime provisions for many years when they do not fall within an express exemption. Paying overtime wages to commissioned employees has not created practical difficulties for employers that comply with the statute, and following the Department of Labor's longstanding interpretation of Section 13(b)(10)(A) would not impose an unreasonable burden on the industry here.

A. Absent An Express Exemption, Commissioned Employees Routinely Have Been Subject To The FLSA's Overtime Provisions

Employers have recognized that commissioned employees are routinely subject to the FLSA's overtime provisions. For example, the Society for Human Resource Management, which is "the world's largest HR membership organization" devoted to human resource management,[7] recognizes that commissioned employees are generally entitled to overtime pay and explains to its members how to calculate it. *See* Allen Smith, *Bonuses, Commissions Included in Regular Rate of Pay Calculation*, SOCIETY FOR HUMAN RESOURCE MANAGEMENT (Sept. 17, 2012), https://www.shrm.org/legalissues/federalresources/pages/regular-rate.aspx. Even the trade publication for automobile dealers recognized not only that commissioned employees generally may be entitled to overtime pay but also that "service advisor[s]" are "not exempt" from the FLSA's overtime provisions. Justin Spath, *Automotive Wage Compliance in the Dealership: Minimum Wage Law Does Apply*, AUTO DEALER TODAY (Dec. 2007), http://www.autodealermonthly.com/channel/dps-office/article/story/2007/12/automotive-wage-compliance-in-the-dealership-minimum-wage-law-does-apply.aspx.

The wide range of reported decisions in which the FLSA's overtime provisions routinely covered commissioned employees illustrates the statute's application to employees who do not fall within an express exemption. For example, when "routemen" who deliver bottled drinks to stores did not satisfy the

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[7] About the Society for Human Resource Management, https://www.shrm.org/about/pages/default.aspx (last visited Dec. 4, 2017).

"outside salesman" exemption of Section 13(a)(1), the workers were entitled to overtime pay even though the employer "paid its routemen a flat fee plus commissions based on volume." *Hodgson v. Klages Coal & Ice Co.*, 435 F.2d 377, 382 (6th Cir. 1970).

Similarly, when firework-stand employees did not fall under the Section 13(a)(3) "amusement or recreational establishment" exemption or the Section 13(a)(1) "administrative personnel" exemption, they were entitled to overtime pay even though they were paid on commission. *See Dole v. Mr. W Fireworks, Inc.*, 889 F.2d 543, 545-47 (5th Cir. 1989).

In *Brennan v. Valley Towing Co.*, 515 F.2d 100 (9th Cir. 1975), a towing company's wrecker-drivers who received a commission were still entitled to overtime pay under the FLSA when the employer "failed to establish any exceptions or exemptions taking them out of the Act's coverage." *Id.* at 103-04. *See also, e.g.*, *Hodgson v. Baker*, 544 F.2d 429, 433-34 (9th Cir. 1976) (tow-truck drivers who received commissions were entitled to overtime pay under the FLSA when the Section 13(a)(1) bona fide executive exemption did not apply).

Further examples, from a diverse range of fields, include retail store managers paid a weekly salary and additional performance-based commissions, *see Lalli v. General Nutrition Ctrs., Inc.*, 85 F. Supp. 3d 560, 561 (D. Mass. 2015), *aff'd*, 814 F.3d 1 (1st Cir. 2016); a delivery man receiving a commission, *see Miranda-Albino v. Ferrero, Inc.*, 455 F. Supp. 2d 66, 77-79 (D.P.R. 2006); gas station operators who received commissions based on the amount of gasoline sold, *see Marshall v. Truman Arnold Distrib. Co.*, 640 F.2d 906, 908-09 (8th Cir. 1981); and yacht salesmen employed to work irregular hours and paid strictly on a commission basis, *see Brennan v. Lauderdale Yacht Basin, Inc.*, 493 F.2d 188, 189 (5th Cir. 1974). Despite the varied industries in which they worked, those employees all had three things in common — they were paid commissions, they did not fall within an explicit FLSA exemption, and they were entitled to overtime pay.

B. Calculating Overtime Pay For Commissioned Employees Is Simple, And Automobile Dealers Are Legally Required To Keep The Records Necessary For Completing The Calculations

The Department of Labor provides clear, straightforward rules to calculate overtime pay for commissioned employees. *See* 29 C.F.R. §§ 778.118-778.122. Those rules apply regardless of whether an employee is paid solely on commission or on a combination of commission and either a salary or hourly wages. *See id.* § 778.117.

For a commission-based employee whose commissions are paid weekly, 29 C.F.R. § 778.118 explains the three steps required to calculate overtime pay. First, the employer divides the employee's total weekly earnings (the sum of the employee's salary, hourly wages, and commissions) by the number of hours worked that week. That establishes the employee's regular rate of pay for that week. Second, the employer divides that regular rate by two to determine the overtime rate of pay — the extra compensation the employer owes for each hour in excess of 40 the employee worked that week. Finally, the employer multiplies that overtime rate by the number of overtime hours worked to calculate the employee's total overtime pay.

A simple example illustrates the process. Suppose a service advisor works 50 hours in a given week and earns $500 (including commissions). To calculate the overtime pay, the dealership follows the three steps:

1. The dealership divides $500 by 50 hours to find the service advisor's regular rate of pay:

   $500 / 50 hrs. = $10/hr.

2. The dealership divides $10/hr. by two to determine the overtime rate of pay:

   $10/hr. / 2 = $5/hr.

3. The dealership multiplies $5/hr. by 10 hours to calculate the total amount of overtime compensation the service advisor has earned:

   $5/hr. * 10 hrs. = $50.

The service advisor is therefore entitled to $50 of overtime pay and should be paid $550 total for that week. The process is repeated each week the service advisor works more than 40 hours. The overtime calculation is not complicated; it involves only three steps, and the calculations are elementary.

The FLSA requires all employers to record the two pieces of information necessary to these calculations — the employee's total weekly hours worked and total weekly wages earned. 29 U.S.C. § 211(c); *see Tony & Susan Alamo Found. v. Secretary of Labor*, 471 U.S. 290, 305 (1953). Specifically, any employer with employees subject to the minimum wage or overtime provisions of the FLSA[8] must maintain and preserve records containing "[h]ours worked" each workday and workweek, and the "[t]otal daily or weekly straight-time earnings or wages due for hours worked during the workday or workweek, exclusive of premium overtime compensation." 29 C.F.R. § 516.2(a)(7)-(8). The Department of Labor has made compliance with those requirements easier by providing the necessary information in an accessible and digestible fact sheet. *See* Wage & Hour Div., U.S. Dep't of Labor, *Fact Sheet #21: Record Keeping Requirements under the Fair Labor Standards Act (FLSA)* (revised July 2008), http://www.dol.gov/whd/regs/compliance/whdfs21.pdf.[9]

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[8] Automobile dealers fall within this category because even their employees who are exempt from the Act's overtime provisions are subject to the minimum wage rules. *See* 29 U.S.C. § 206.

Employers must record their employees' weekly hours worked and weekly wages earned even if they are excused from complying with § 516.2's other record-keeping requirements on the ground that their employees are exempt from the overtime provisions under Section 13. *See* 29 C.F.R. § 516.12; *see also* 29 U.S.C. § 211(c); 29 C.F.R. § 516.2; *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 687-88 (1946). Even if automobile dealers honestly believed that service advisors fall under the Section 13(b)(10)(A) exemption, therefore, they had no basis for failing to record service advisors' weekly hours worked and wages earned.[10] All automobile dealers are accordingly required to maintain records of the information necessary to compute overtime pay for service advisors.[11] Completing the three simple calculations necessary to compensate service advisors with the overtime pay to which they are entitled would not be burdensome.

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[9] Employers also have a powerful incentive to comply with their legal obligations. An employer that fails to keep an accurate record of the hours worked by a commissioned employee cannot meet the burden of proof required to establish that the Section 7(i) exemption applies to that employee. *See* 29 C.F.R. § 516.16; Wage & Hour Div., U.S. Dep't of Labor, *Fact Sheet #20: Employees Paid Commissions By Retail Establishments Who Are Exempt Under Section 7(i) From Overtime Under The FLSA* (revised July 2008), http://www.dol.gov/whd/regs/compliance/whdfs20.pdf.

IV. INTERPRETING THE FLSA TO COVER SERVICE ADVISORS WILL NEITHER DISRUPT SETTLED EXPECTATIONS NOR IMPOSE UNDUE RETROACTIVE LIABILITY ON EMPLOYERS

The FLSA overtime provisions apply even in the face of "settled industry practices." Pet. Br. 52. Petitioner and its *amici* are incorrect to argue that applying the FLSA overtime provisions to service advisors would disrupt settled expectations and open dealers to retroactive liability. Moreover, the Department of Labor regulatory interpretations of Section 13(b)(10)(A) have given employers no basis for establishing expectations that service advisors would be treated as exempt.

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[10] Section 516.12 excuses employers from recording the regular hourly rate of pay for Section 13 exempt employees, but that number readily can be calculated from information that a dealership is required to record, as demonstrated by step one of the overtime pay calculation noted above.

[11] Most courts that have addressed the issue have concluded that the record-keeping burden cannot be shifted to the employees and cannot be delegated or discharged. *See, e.g.*, *Castillo v. Givens*, 704 F.2d 181, 194 (5th Cir. 1983).

A. Longstanding Compensation Practices Do Not Create An Exemption From The FLSA's Overtime Provisions Because Employees Cannot Waive Those Provisions

"[P]reviously agreed-upon compensation arrangements" that purport to rely on commissions in lieu of overtime pay do not undermine the validity of respondents' claims under the FLSA. *See* NADA Br. 15-16. "This Court's decisions interpreting the FLSA have frequently emphasized the nonwaivable nature of an individual employee's right to a minimum wage and to overtime pay under the Act." *Barrentine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728, 740-41 (1981).[12] Accordingly, this Court consistently has held that "FLSA rights cannot be abridged by contract or otherwise waived because this would 'nullify the purposes' of the statute and thwart the legislative policies it was designed to effectuate." *Id.* (citing *Brooklyn Sav. Bank v. O'Neil,* 324 U.S. 697, 707 (1945)); *see D. A. Schulte, Inc. v. Gangi*, 328 U.S. 108, 114-16 (1946); *Walling*, 323 U.S. at 42; *Missel*, 316 U.S. at 577.

Nor does petitioner's assertion that those "longstanding compensation arrangements" represent "long-settled industry practices," Pet. Br. 52, diminish the power of respondents' claims to be paid overtime as required under the FLSA. This Court has made clear that "[t]he Fair Labor Standards Act was not designed to codify or perpetuate [industry] customs and contracts .... Congress intended, instead, to achieve a uniform national policy of guaranteeing compensation for all work or employment engaged in by employees covered by the Act. Any custom or contract falling short of that basic policy, like an agreement to pay less than the minimum wage requirements, cannot be utilized to deprive employees of their statutory rights." *Barrentine*, 450 U.S. at 740-41 (second and third alterations in original).[13] Not even highly paid employees can waive their FLSA protections through contract or private agreement if otherwise not exempt. *See Jewell Ridge Coal*, 325 U.S. at 167 ("[E]mployees are not to be deprived of the benefits of the [FLSA] simply because they are well paid or because they are represented by strong bargaining agents.").

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[12] The FLSA permits employers and employees to avoid coverage under the Act in certain enumerated situations, none of which is relevant here. *See* 29 U.S.C. § 207(b), (f), (g).

B. The Department Of Labor's Actions Have Not Created Any Settled Expectations That Service Advisors Are Exempt From The FLSA Overtime Provisions

Since 1970, the Department of Labor's formal regulatory interpretations of Section 13(b)(10)(A) consistently have treated service advisors as non-exempt employees under the FLSA. In 1970, the Department adopted an Interpretive Regulation stating that service managers are not exempt employees under Section 13(b)(10)(A). *See* 35 Fed. Reg. 5856, 5896 (Apr. 9, 1970) (codified at 29 C.F.R. § 779.372(c)(4) (1971)). That interpretive regulation was not altered until 2011, when the Department adopted a final rule after notice and comment that reaffirmed its interpretation of Section 13(b)(10)(A) not to provide an exemption for service advisors. *See* Final Rule, Updating Regulations Issued Under the Fair Labor Standards Act, 76 Fed. Reg. 18,832 (Apr. 5, 2011).

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[13] *See also Brooklyn Sav. Bank*, 324 U.S. at 704 ("Where a private right is granted in the public interest to effectuate a legislative policy, waiver of a right so charged or colored with the public interest will not be allowed where it would thwart the legislative policy which it was designed to effectuate.").

This case is thus unlike *Christopher v. SmithKline Beecham Corp.*, in which "the . . . industry had little reason to suspect that its longstanding practice of treating [these employees] as exempt . . . transgressed the FLSA." 567 U.S. at 157. To the contrary, automobile dealers have had ample notice for five decades that their compensation arrangements with their service advisors are likely unlawful under the FLSA. Industry trade publications demonstrate the widespread understanding within the industry that extant practices did not comply with the FLSA. *See, e.g.*, Justin Spath, *Automotive Wage Compliance in the Dealership: Minimum Wage Law Does Apply*, AUTO DEALER TODAY (Dec. 2007) (noting that "the FLSA specifically describes a group of employees in automotive dealerships that do not qualify for overtime exemptions" and that "'Employees variously described as . . . service writer, service advisor or service salesman . . . are not exempt.' This is probably one of the most common exemption mistakes made in an automotive dealership.") (quoting 29 C.F.R. § 779.372(c)(4) (2007)) (ellipses in original), http://www.autodealermonthly.com/channel/dps-office/article/story/2007/12/automotive-wage-compliance-in-the-dealership-minimum-wage-law-does-apply.aspx.

Neither the 1978 Opinion Letter nor the Department of Labor's 1987 *Field Operations Handbook* justifies petitioner's claim (at 51-54) that enforcing the statute now would unduly upset settled expectations.

In 1978, after a few lower courts rejected the Department of Labor's interpretation of Section 13(b)(10)(A),[14] the Department issued an Opinion Letter stating that "service writers in certain circumstances can be properly regarded as engaged in selling activities." Wage & Hour Opinion Letter WH-467, 1978 WL 51403, at *1 (July 28, 1978). Nine years later, it revised its *Field Operations Handbook* along the same lines. *See* Wage & Hour Div., U.S. Dep't of Labor, *Field Operations Handbook* 24L04-4, Insert No. 1757 (Oct. 20, 1987) ("Employees variously described as service writers, service advisors, service managers, or service salesmen . . . have been construed as within the exemption in Sec 13(b)(10)(A) by two appellate courts (Fifth and Sixth Circuits) and two district courts (in the Eighth and Tenth Circuits). Consequently, [the Wage and Hour Division] will no longer deny the [overtime] exemption for such employees.").

Neither of these documents had the force and effect of law, and thus could not have altered the Department of Labor's 1970 Interpretive Regulation. *See Christensen v. Harris County*, 529 U.S. 576, 587 (2000). Indeed, the Department of Labor makes clear that the *Field Operations Handbook* is not intended to establish interpretive policy or to make any implied or express guarantees to the public, putting the industry on notice of its limited purpose — to advise Department agents of the agency's current enforcement policy. *See* Wage & Hour Div., U.S. Dep't of Labor, *Field Operations Handbook (FOH)* (last updated Aug. 31, 2017) ("The Field Operations Handbook (FOH) is . . . not used as a device for establishing interpretative policy."), http://www.dol.gov/whd/foh/.

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[14] *See, e.g.*, *Brennan v. Deel Motors, Inc.*, 475 F.2d 1095, 1098 (5th Cir. 1973).

In any event, the Department of Labor's 2008 Notice of Proposed Rulemaking ("NPRM") put petitioner and the automobile dealers industry on notice that the application of the Section 13(b)(10)(A) exemption to service advisors was, at best, unsettled. In the NPRM, the Department explained that "[t]he current regulation . . . states that . . . service manager[s] . . . [are] not exempt under section 13(b)(10)(A)" and proposed to change that interpretation to conform to contrary court decisions. Notice of Proposed Rulemaking, Updating Regulations Issued Under the Fair Labor Standards Act, 73 Fed. Reg. 43,654, 43,658 (July 28, 2008). In 2011, the Department adopted a final rule reaffirming rather than changing its original 1970 interpretation. *See supra* pp. 19-20. After careful consideration of the comments received in response to the NPRM, the Department concluded that the plain text of the exemption "limit[s] the exemption to salesmen who sell vehicles and partsmen and mechanics who service vehicles" and that therefore service advisors were not exempt employees under Section 13(b)(10)(A). 76 Fed. Reg. at 18,838. Because the NPRM made clear that service advisors were *not* exempt under current regulation and that the agency was only *considering* changing that regulation, the fact that the final rule did not adopt the proposed change does not undermine the notice provided by the interpretive guidance contained in the 2008 NPRM. *Cf. Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 170-71 (2007) ("the Department's recourse to notice-and-comment rulemaking in an attempt to codify its new interpretation makes any such [unfair] surprise unlikely here") (citation omitted).

Finally, the 2011 regulation, promulgated after full notice-and-comment rulemaking, eliminates any plausible claim that petitioner and automobile dealers might have to reliance on settled expectations or concerns about unfair retroactive liability for their actions after the date the regulation became final. Within *days* of the Department publishing the final rule, industry advisors disseminated working papers updating dealerships on the rule and counseling them to revise their pay structures accordingly.[15]

Contrary to petitioner's claims (at 51-54), applying the FLSA's overtime provisions to service advisors does not impose retroactive liability, create evidentiary difficulties, or provide covered employees with an unjustified windfall. First, the Portal-to-Portal Act of 1947 protects against unfair application of the FLSA to actions taken in good-faith reliance on prior agency interpretive statements. 29 U.S.C. § 259. Second, as noted above, *supra* pp. 15-17, petitioner is obligated by other provisions of the FLSA to maintain all the wage-and-hour records necessary to compute overtime pay for its service advisors. Finally, receiving overtime compensation to which they are statutorily entitled can hardly be called a windfall for service advisors. Indeed, the fact that petitioner and other automobile dealers have avoided paying statutorily mandated overtime to these employees for 50 years is the real windfall in this case.

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[15] *See, e.g.*, Fisher & Phillips LLP, *The FLSA Overtime Exemption for Service Writers* (Apr. 11, 2011) ("Any dealership that does not already have a possible back-up exemption for their service writers — the so-called 'commission-paid retail' employee exemption — should immediately consider taking the steps to claim it"), https://www.laborlawyers.com/the-flsa-overtime-exemption-for-service-writers; Ford & Harrison LLP, *Labor Alert: Department of Labor Reverses Position on Exemption of Service Advisors Working for Automobile Dealerships* (Apr. 7, 2011) ("[I]n order to comply with this new policy, dealerships will have to take into account all earnings for service advisors during the relevant time period including salary plus any commissions to determine the appropriate amount of overtime pay which may be due."), http://www.fordharrison.com/legal-alert-department-of-labor-reverses-position-on-exemption-of-service-advisors-working-for-automobile-dealerships.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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Brishen Rogers is an Associate Professor of Law at Temple University Beasley School of Law. His scholarship and areas of expertise are in employment and labor Law, corporate law, and torts. Prior to joining the Temple faculty, he was a Climenko Fellow and Lecturer on Law at Harvard Law School. Professor Rogers' scholarship draws on the social sciences and liberal political theory to better understand why and how to regulate labor markets. His current research falls into two streams. The first considers the constitutional and normative dimensions of economic inequality. The second explores how new technologies are both altering the world of work and creating new opportunities for social and political mobilization. Before attending law school, he worked as a community organizer promoting living wage policies.

RECORD
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BRIEFS

FILED
NOV - 8 2017
OFFICE OF THE CLE
SUPREME COURT, U.

No. 16-1362

IN THE

Supreme Court of the United States

ENCINO MOTORCARS, LLC,

Petitioner,

v.

HECTOR NAVARRO; MIKE SHIRINIAN; ANTHONY PINKINS; KEVIN MALONE; AND REUBEN CASTRO,

Respondents.

**On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit**

BRIEF OF CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, THE NATIONAL FEDERATION OF INDEPENDENT BUSINESS, AND RETAIL LITIGATION CENTER AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether "service advisors" at car dealerships are exempt under 29 U.S.C. § 213(b)(10)(A) from the Fair Labor Standards Act's overtime-pay requirements.

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INTERESTS OF THE *AMICI CURIAE*[1]

The Chamber of Commerce of the United States of America ("the Chamber") is the world's largest federation of businesses and associations. The Chamber represents three hundred thousand direct members and indirectly represents an underlying membership of more than three million U.S. businesses and professional organizations of every size and in every economic sector and geographic region of the country. An important function of the Chamber is to represent the interests of its members in matters before the courts, Congress, and the Executive Branch. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of vital concern to the nation's business community.

The National Federation of Independent Business Small Business Legal Center ("NFIB Legal Center") is a nonprofit, public interest law firm established to provide legal resources and be the voice for small businesses in the Nation's courts through representation on issues of public interest affecting small businesses. NFIB is the nation's leading small business association, representing members across the country. To fulfill its role as the voice for small business, the NFIB Legal Center frequently files *amicus curiae* briefs in cases that will impact small businesses.

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[1] Counsel for both Petitioner and Respondents have filed, with the Clerk of this Court, blanket consent to the filing of *amicus curiae* briefs. As required by Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part and that no person or entity other than *amici*, their members, or their counsel made a monetary contribution intended to fund the preparation or submission of this brief.

The Retail Litigation Center, Inc. ("RLC") is a public policy organization that identifies and engages in legal proceedings that affect the retail industry. The RLC's members include many of the country's largest and most innovative retailers. The member entities whose interests the RLC represents employ millions of people throughout the United States, provide goods and services to tens of millions more, and account for tens of billions of dollars in annual sales. The RLC seeks to provide courts with retail-industry perspectives on important legal issues, and to highlight the potential industry-wide consequences of significant pending cases.

Collectively, the foregoing *amici* represent a wide cross-section of the employer community throughout the United States. American employers dedicate considerable time, energy, and resources to achieving compliance with the myriad statutes governing the workplace, including the Fair Labor Standards Act ("FLSA" or "Act"), while at the same time maintaining and creating much-needed jobs. *Amici*'s members therefore have a strong interest in fostering statutory interpretation that is fair, predictable, and evenhanded—rather than having courts unjustifiably put a thumb on the scales at the outset of the interpretive process. This case affords the Court an opportunity to advance this sensible approach to interpretation of workplace laws by rejecting the unwarranted canon that FLSA exemptions must be narrowly construed.

INTRODUCTION AND SUMMARY OF ARGUMENT

"On occasion, a would-be doctrinal rule or test finds its way into [this Court's] case law through simple repetition of a phrase—however fortuitously coined." *Lingle v. Chevron USA Inc.*, 544 U.S. 528, 531 (2005). When it becomes apparent, however, that such "repetition of a phrase" is "doctrinally untenable," this Court has properly stepped in to "correct course" and hold that the phrase—however familiar it may be—"has no proper place in [its] jurisprudence." *Id.* at 531, 544, 548 (emphasis omitted).

This case calls for just such a clarification. From time to time, this Court has stated "that remedial statutes should be liberally construed" to effectuate their remedial purpose. *SEC v. CM Joiner Leasing Corp.*, 320 U.S. 344, 353 (1943). In 1945, this Court went one step further by stating that, because the FLSA was "designed to extend the frontiers of social progress," purposeful, *explicit exemptions* to such "humanitarian and remedial legislation" should "be narrowly construed." *AH Phillips, Inc. v. Walling*, 324 U.S. 490, 493 (1945) (internal quotation marks omitted). "[T]hrough simple repetition," *Lingle*, 544 U.S. at 531, this statement has seeped into the caselaw and produced the "made-up canon" that FLSA exemptions should be narrowly construed, *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2131 (2016) (Thomas, J., dissenting).

While this Court has in practice placed little weight on the notion that FLSA exemptions should be narrowly construed, the Ninth Circuit placed substantial weight on that canon to hold that service advisors at automobile dealerships are not exempt from the FLSA's overtime-pay provision. *See Navarro v. Encino Motorcars, LLC*, 845 F.3d 925, 935–36 (9th Cir. 2017). That reliance was misplaced.

As an initial matter, there is no basis in either law or logic to infer that Congress means more (or less) than it says in a statute, simply because the legislation might be described as "remedial." *See, e.g.*, Antonin Scalia, *Assorted Canards of Contemporary Legal Analysis*, 40 Case W. Res. L. Rev. 581, 581–86 (1990). Indeed, the canon that remedial statutes should be liberally construed rests on a fundamental misconception about the legislative process—namely, that Members of Congress draft statutes to pursue a single objective without compromise or moderation. Moreover, the liberal-construction canon is unsupportable because it is "indeterminate, as to both when it applies and what it achieves." *Id.* at 586. For these reasons, courts should not assume that Congress intends for so-called "remedial" statutes to extend more broadly than their text, structure, and purpose indicate.

Moreover, the liberal-construction canon's supposed corollary—that courts should assume Congress is less than sincere when it includes explicit exemptions to a "remedial" statute—is doubly flawed, particularly in the FLSA context. The numerous exemptions to the so-called "remedial" provisions of the Act clearly demonstrate that Congress did *not* intend the Act to impose limitless burdens on employers. It is especially problematic to assume that the exemption at issue here—which encompasses "any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles," 29 U.S.C.

§ 213(b)(10)(A)—should be construed more narrowly than its plain text would otherwise indicate. Congress amended this exemption repeatedly to calibrate its scope, making perfectly clear that it did not wish the FLSA to be unthinkingly extended in this context.

The Court should make clear that exemptions to the FLSA should be reflexively construed neither narrowly nor broadly but, rather, should be construed correctly. The proper approach to interpreting FLSA exemptions is of course squarely presented in this case, which calls for the Court to interpret § 213(b)(10)(A)'s automobile dealership exemption. Moreover, *stare decisis* presents no obstacle to disapproving the canon, because *amici* are unaware of any decision in which the canon represented an essential part of this Court's holding. At the same time, FLSA caselaw suggests that the canon is not simply an ill-advised, yet harmless turn of phrase; rather, lower court opinions indicate that this canon has distorted the process of interpreting the FLSA. Consequently, the Court should make clear that this rule "has no proper place in [its] jurisprudence," *Lingle*, 544 U.S. at 548. *See Encino Motorcars, LLC*, 136 S. Ct. at 2131 (Thomas, J., dissenting) (urging the Court to reject this "made-up canon").

ARGUMENT

I. THIS COURT SHOULD REJECT THE UNJUSTIFIABLE CANON THAT EXEMPTIONS TO THE FLSA MUST BE NARROWLY CONSTRUED.

The canon that FLSA exemptions should be narrowly construed descends from the following statement of the Court in *AH Phillips*:

> The Fair Labor Standards Act was designed to extend the frontiers of social progress by insuring to all our able-bodied working men and women a fair day's pay for a fair day's work. Any exemption from such humanitarian and remedial legislation must therefore be narrowly construed . . . . To extend an exemption to other than those plainly and unmistakably within its terms and spirit is to abuse the interpretative process and to frustrate the announced will of the people.

324 U.S. at 493 (internal quotation marks and citation omitted). This hostile view toward exemptions to "remedial" statutes, in turn, is an application of "the familiar canon of statutory construction that remedial legislation should be construed broadly to effectuate its purposes." *Tcherepnin v. Knight*, 389 U.S. 332, 336 (1967).

As discussed in detail below, the canon that remedial statutes should be liberally construed is flawed. *See infra* at § I.A. And this canon's purported corollary—that courts should narrowly construe exemptions to remedial statutes—only exacerbates the flaws inherent in the liberal-construction canon. *See infra* at § I.B. Perhaps this is why Respondents offer only a tepid endorsement of the notion, featured prominently in the decision below, that FLSA exemptions must be narrowly construed. *See* Br. in Opp'n 16–17.

A. The Canon That a Remedial Statute Should Be Liberally Construed to Effectuate Its Purposes Is Flawed.

The notion that a remedial statute must be broadly construed to advance its purposes—which an eight-Justice majority aptly labeled the "last redoubt of losing causes," *OWCP v. Newport News Shipbuilding & Dry Dock Co.*, 514 U.S. 122, 135 (1995)—suffers from three severe flaws.

1. The liberal-construction canon rests on an elemental misunderstanding of the legislative process. Leading jurists and commentators have laid bare the erroneous premise that underlies this canon—namely, that Congress intends statutes to extend as far as possible in service of a single objective. *See Encino Motorcars, LLC*, 136 S. Ct. at 2131 (Thomas, J., dissenting); Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 21, 362–63 (2012); Richard Posner, *Statutory Interpretation—In the Classroom and in the Courtroom*, 50 U. Chi. L. Rev. 800, 808–09 (1983). Simply put, this canon "goes wrong by being unrealistic about legislative objectives." *Statutory Interpretation*, *supra* at 808–09.

In reality, "no legislation pursues its purposes at all costs." *Rodriguez v. United States*, 480 U.S. 522, 525–26 (1987) (per curiam); *see also OWCP*, 514 U.S. at 135–36. Instead, legislators inevitably balance how far a statute should go toward achieving one particular objective against various other objectives that they or their colleagues also value. *Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2033–34 (2014) ("'Congress wrote the statute it wrote'—meaning, a statute going so far and no further."); *Rodriguez*, 480 U.S. at 525–26; *OWCP*, 514 U.S. at 135–36. "Legislation is, after all, the art of compromise," and "the limitations expressed in statutory terms [are] often the price of passage." *Henson v. Santander Consumer USA Inc.*, 137 S. Ct. 1718, 1725 (2017).[2] Indeed, "[d]eciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice." *Rodriguez*, 480 U.S. at 525–26; *see also OWCP*, 514 U.S. at 136 ("Every statute proposes, not only to achieve certain ends, but also to achieve them by particular means—and there is often a considerable legislative battle over what those means ought to be."). In short, as the Court in *Bay Mills* recently explained, "[t]his Court has no roving license . . . to disregard clear language simply on the view that . . . Congress 'must have intended' something broader." 134 S. Ct. at 2034.

As a result, when courts analyze the balance struck by Congress in a remedial statute, the goal "should be neither liberally to expand nor strictly to constrict its meaning, but rather to get the meaning precisely right." *Assorted Canards*, *supra* at 582; *see also id.* at 581–86; *Reading Law*, *supra* at 21, 362–63. Doing otherwise "would upset the compromise that the [remedial] statute was intended to embody." *Statutory Interpretation*, *supra* at 809; *see also Bay Mills*, 134 S. Ct. at 2034; *Rodriguez*, 480 U.S. at 526. To be sure, divining congressional intent "may often be difficult, but [there is] no reason, *a priori*, to compound the difficulty, and render it even more unlikely that the precise meaning will be discerned, by laying a judicial thumb on one or the other side of the scales" when interpreting a remedial statute. *Assorted Canards, supra* at 582.

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[2] This point is uncontroversial; in fact, the Court unanimously reiterated it just last Term. *See Henson*, 137 S. Ct. at 1725.

Because the aim of statutory interpretation is to assess congressional intent, the rule of construing remedial statutes broadly reflects an assumption that Congress would have intended for some statutes to prohibit or require more than their text, structure, and purpose would otherwise indicate. But there is no reason to think that Congress is more or less timid in expressing its will through the text and structure of certain statutes, simply because those laws might be "remedial" in some vague, undefined sense. Consequently, the Court has emphasized that "it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law." *Rodriguez*, 480 U.S. at 526; *see also Henson*, 137 S. Ct. at 1725; *Bay Mills*, 134 S. Ct. at 2034.

2. Another ill that infects the liberal-construction canon is that there is virtually no clarity about *when* the canon should apply. Indeed, "there is not the slightest agreement on what . . . the phrase 'remedial statutes'" means. *Assorted Canards, supra* at 583; *see also id.* at 586. Accordingly, even accepting the liberal-construction canon on its own terms, courts are left to speculate about *when* the canon should apply. This ambiguity creates a risk that courts will inconsistently apply the canon—perhaps only when it suits the desired result.

To be sure, the term "remedial" has been defined as "'intended for a remedy or for the removal or abatement of an evil.'" *Assorted Canards*, *supra* at 583 (quoting *Webster's Third New International Dictionary* 1920 (1961)). Similarly, *Black's Law Dictionary* defines the phrase "remedial statute" to mean (1) "[a]ny statute other than a private bill; a law providing a means to enforce rights or redress injuries" or (2) "[a] statute enacted to correct one or more defects, mistakes, or omissions." *Id.* (10th ed. 2014). These definitions, however, serve only to illustrate how unworkable the liberal-construction canon is: If courts must liberally construe any statute that aims to create a remedy or mitigate an evil. then *all* statutes are in some sense remedial. "since one can hardly conceive of a law that is not meant to solve some problem." *Assorted Canards*, *supra* at 583; *see also Reading Law*, *supra* at 364 ("Is any statute *not* remedial? Does any statute *not* seek to remedy an unjust or inconvenient situation?"); *Statutory Interpretation*, *supra* at 809. And if the liberal-construction canon applies to *all* statutes, thus "leaving nothing to be construed straight down the middle," *Assorted Canards*, *supra* at 585, then the canon has little or no meaning.

3. Assuming for the sake of argument that one could settle on a useful definition of what statutes are "remedial," the liberal construction canon would still remain hopelessly malleable and manipulable. After all, after one lets go of the conventional tools of statutory interpretation, there is no objective means of determining "[h]ow liberal is liberal." *Assorted Canards*, *supra* at 582.

"[I]t is virtually impossible to expect uniformity and objectivity when there is added, on one or the other side of the balance, a thumb of indeterminate weight." Antonin Scalia, *A Matter of Interpretation:*

Federal Courts and the Law 28 (1997). The result is that this canon "can be used, or not used, or half-used, almost *ad libitum*, depending mostly upon whether its use, or nonuse, or half-use, will assist in reaching the result the court wishes to achieve." *Id.*; *A Matter of Interpretation*, *supra* at 27–28.

B. The Notion That FLSA Exemptions Should Be Narrowly Construed Against Employers Doubles Down on the Flaws Inherent in the Liberal-Construction Canon.

The purported corollary of the liberal-construction rule is that exemptions to the FLSA should be narrowly construed. But this principle, which was spawned in *AH Phillips*, only doubles down on the flaws inherent in the liberal-construction canon.

Even assuming that "remedial" statutes should be broadly construed, there is simply no basis to conclude that Congress intends remedial statutes to be extended *in the face of an express exemption*. In such instances, by definition, Congress has explicitly stated that it does *not* wish the statute to be extended broadly. And there is no reason to believe, in the abstract, that Congress in these situations does not mean what it says, or that it feels more strongly about the statute's prohibitions than its exemptions.

Indeed, one could just as easily say that *exemptions* to remedial statutes are themselves "remedial," as they are intended to remedy the otherwise excessive scope of more general provisions. Accordingly, if one took seriously the rule of broadly construing "remedial" provisions, there is at least as strong an argument that statutory *exemptions* should be read broadly. Of course, such complexity and confusion can be avoided simply by interpreting the exemptions through the standard tools of statutory construction, without handicapping one outcome over another.

Placing a thumb on the interpretive scale is particularly inappropriate in the context of the FLSA for two reasons, each of which is explored below.

1. Congress included so many exemptions to the so-called "remedial" provisions of the FLSA that it is particularly implausible to assume Congress had no concern for the FLSA's breadth. Like any statute, the FLSA embodies a balance of legislative priorities. On the one hand, the Act protects the "'health, efficiency, and general well-being of workers,'" *Barrentine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728, 739 (1981) (quoting 29 U.S.C. § 202(a)), by requiring employers to provide certain employees with benefits such as overtime pay, 29 U.S.C. §§ 206, 207. On the other hand, the Act includes numerous exemptions recognizing that FLSA protections are unnecessary and even ill-advised where employers and employees alike would benefit from alternative compensation practices. *See* 29 U.S.C. § 213(a).

Specifically, Congress excluded from the FLSA's general protections over 50 categories of employees ranging from white collar workers, to fishermen and seamen, to employees of movie theaters or the maple syrup industry. It is, therefore, implausible to suggest that Congress was shy about carving out exemptions or that it intended to disfavor employers at every turn. In fact, as discussed below, Congress amended the FLSA precisely "to curtail employee-protective interpretations of the FLSA." *Anderson v. Cagle's,* *Inc.*, 488 F.3d 945, 958 (11th Cir. 2007). Consequently, construing the FLSA based on the assumption that Congress uniformly intended to disfavor employers "contravenes . . . the readily apparent intent" of Congress. *Id.*

The FLSA's automobile dealership exemption provides a perfect example. In 1961, Congress exempted *all* employees of automobile dealerships from the FLSA's overtime pay provision. Fair Labor Standards Amendments of 1961, Pub. L. No. 87-30, § 9, 75 Stat. 65, 73 (codified at 29 U.S.C. § 213(a)(19) (1964)) (exempting "any employee of a retail or service establishment which is primarily engaged in the business of selling automobiles"); *see also Encino Motorcars, LLC*, 136 S. Ct. at 2122. Five years later, however, Congress amended the automobile dealership exemption so that it would apply only to a specific subset of dealership employees: "any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles . . . ." Fair Labor Standards Amendments of 1966, Pub. L. No. 89-601, § 209, 80 Stat. 830, 836; *see also Encino Motorcars, LLC*, 136 S. Ct. at 2122. Congress again amended the exemption in 1974, but not in ways that are directly relevant here. *See* Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, § 14, 88 Stat. 55, 65. Through this process of legislative tinkering, Congress carefully calibrated—and recalibrated—the scope of the automobile dealership exemption. In such a scenario, it is fanciful to think that loading the dice in favor of a particular interpretation—by narrowly construing the exemption against employers—is the best way to honor Congress's intent. Rather, courts should deploy the ordinary tools of statutory construction to determine the exemption's intended meaning.

2. The argument that FLSA exemptions should be narrowly construed is animated by a desire to protect employees' wage and hour rights. *See AH Phillips*, 324 U.S. at 493. But this argument is misguided because, in many cases, the FLSA exemptions serve the interests of employees as well as employers. That the Act's exemptions do not inherently trench on employees' rights confirms that the exemptions should be interpreted fairly, not in an unduly narrow manner.

Congress believed that the best way to ensure "a fair day's pay" was to require overtime in *some circumstances*. *Id.* That said, Congress likewise believed (as demonstrated by the inclusion of explicit exemptions), that alternative compensation arrangements could provide better and fairer pay in *other circumstances*. *See Nicholson v. World Bus. Network, Inc.*, 105 F.3d 1361, 1363 (11th Cir. 1997) ("The chief financial officer of a company, for instance, would be less likely to [need statutorily required overtime pay] than a janitor or assembly linesman."). Courts should draw the line between these two sets of circumstances by interpreting the text and purpose of the statutory exemption, not by "laying a judicial thumb on one or the other side of the scales." *Assorted Canards*, *supra* at 582.

Again this case is illustrative. Service advisors are well compensated: They earn an average of more than $64,000 per year, with the top 10% earning an average in excess of $97,000 per year. Br. of *Amici Curiae* Nat'l Auto. Dealers Ass'n *et al.* 7 (filed June 12, 2017); *see also id.* at 7–8 (noting that service advisors in the states falling within the Ninth Circuit earn considerably more). And Respondents are compensated solely via commissions. *See Encino Motorcars, LLC*, 136 S. Ct. at 2124. Thus, to the extent they worked long hours, they did so not "out of desperation," *Mechmet v. Four Seasons Hotels, Ltd.*, 825 F.2d 1173, 1176 (7th Cir. 1987), but instead based on an incentive to increase their compensation. "They are, after all, already highly compensated, so it is unlikely that a victory in this lawsuit will improve their net position, and it might worsen it." *Id.* at 1179.

In short, forced overtime would saddle automobile dealerships and service advisors with a compensation model in which service advisors would be limited in the hours they could work and unable to earn extra pay for better performance. Accordingly, while Respondents themselves would obtain a windfall if they were to prevail in this suit, their narrow construction of the FLSA's automobile dealership exemption would *undermine* rather than promote the interests of service advisors going forward. There is no basis to assume *a priori* that Congress would wish this result, simply because the FLSA might be deemed, in some vague sense, "remedial."

II. THE COURT SHOULD SEIZE THIS OPPORTUNITY TO REJECT THE PURPORTED CANON THAT FLSA EXEMPTIONS MUST BE NARROWLY CONSTRUED.

The Court should seize the opportunity presented in this case to reject the "made-up canon" that FLSA exemptions must be narrowly construed. This supposed canon is wreaking havoc in the lower courts—a situation that would be remedied if this

Court were to banish the anti-employer canon once and for all. The canon's validity is squarely presented here, and prudential considerations counsel strongly in favor of addressing this question now.

Lower courts often perceive themselves to be bound by this Court's dicta regarding the narrow construction of FLSA exemptions. This perception creates a risk that lower courts will pull up short of the careful analysis needed to decide close cases, defaulting instead to the canon in order to construe an exemption narrowly. For instance, in the decision below, the Ninth Circuit repeatedly emphasized that it was "bound by Supreme Court precedent to construe the exemption narrowly." *Navarro*, 845 F.3d at 935.[3] Yet the Supreme Court of Montana reached the opposite conclusion on the merits when not relying on the canon. *See Thompson v. J.C. Billion, Inc.*, 294 P.3d 397, 401 (Mont. 2013) (failing to apply the canon, although noting that the lower court did so, and holding that service advisors fall within the FLSA's automobile dealership exemption). Indeed, at least one other court has suggested expressly that the canon was the dispositive factor in its analysis. *Amendola v. Bristol-Myers Squibb Co.* 558 F. Supp. 2d 459, 472 (S.D.N.Y. 2008) (distinguishing decisions in factually identical cases because the courts did "not acknowledge that the FLSA's exemptions must be narrowly construed against employers"); *see Miller v. Team Go Figure*, No. 3:13-CV-1509-0, 2014 WL 1909354, at *7 (N.D. Tex. May 13, 2014) (relying heavily on the canon).

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[3] *See also Navarro*, 845 F.3d at 935 (explaining the Ninth Circuit's view that "the Supreme Court's longstanding principle of narrow construction applies here" and that lower courts "may not disregard the Court's existing, binding precedent" as to this point); *id.* (relying on "the longstanding rule that exemptions in § 213 of the FLSA 'are to be narrowly construed against the employers seeking to assert them'"); *id.* at 936 (repeating the purported "rule" yet again).

In recent years, this Court has twice declined to apply the canon that FLSA exemptions must be narrowly construed. In *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156 (2012), the Court concluded that FLSA's "outside salesman" exemption did "not furnish a clear answer" to the question at issue, but the Court nonetheless declined to apply the canon. *Id.* at 2170, 2172 n.21 (reasoning that the canon "is inapposite where . . . [the Court is] interpreting a general definition that applies throughout the FLSA"). In *Sandifer v. U.S. Steel Corp.*, 134 S. Ct. 870 (2014), the Court again chose not to apply the canon. *Id.* at 879 n.7. Indeed, eight Justices joined an opinion that went out of its way to avoid reliance on the canon. *See id.* ("This Court has stated that 'exemptions' in the Fair Labor Standards Act 'are to be narrowly construed against the employers seeking to assert them.' *We need not disapprove that statement to resolve the present case.*") (emphasis added).

Then, last Term, when this Court held that the Ninth Circuit improperly had accorded *Chevron* deference to the Department of Labor's interpretation, Justices Thomas and Alito indicated that they would have reached the merits and rejected "the made-up canon that courts must narrowly construe the FLSA exemptions." *Encino Motorcars, LLC*, 136 S. Ct. at 2131 (Thomas, J., dissenting). As Justice Thomas's opinion forcefully underscored, there is absolutely "no basis to infer that Congress means anything beyond what a statute plainly says simply because the legislation in question could be classified as 'remedial.'" *Id.* In fact, the opinion highlighted that the purported canon "appears to rest on an elemental misunderstanding of the legislative process, viz., that Congress intends statutes to extend as far as possible in service of a singular objective." *Id.* (internal quotation marks and brackets omitted).

The Court should squarely reject this canon in this case. Addressing the canon's validity would be proper under this Court's Rules. Rule 14(1)(a) dictates that the question presented "is deemed to comprise every subsidiary question fairly included therein." *Id.* Here, the question presented is whether the FLSA's automobile dealership exemption applies to service advisors. And determining the proper standard to be used when interpreting that exemption is an issue that is antecedent to—and "fairly included" within—the question presented. *See id.*; *see also* Pet. 30–31 (discussing the canon in the context of addressing whether service advisors fall within the automobile dealership exemption).

Moreover, although this Court has previously endorsed the canon that FLSA exemptions should be narrowly construed, *e.g.*, *AH Phillips, Inc.*, 324 U.S. at 493, *stare decisis* presents no obstacle to rejecting it now. "[T]his Court is bound by holdings, not language." *Alexander v. Sandoval*, 532 U.S. 275, 282 (2001); *see Lingle*, 544 U.S. at 545–46 ("We emphasize that our holding today—that the 'substantially advances' formula is not a valid takings test—does not require us to disturb any of our prior holdings. To be sure, we applied [this] inquiry in *Agins* itself . . . . But in no case have we found a compensable taking based on such an inquiry."). *Amici* are not aware of any decision in which this canon was an essential part of the Court's holding. For example, the Court recited the canon in *Mitchell v. Ky. Finance Co.*, 359 U.S. 290 (1959), but it did so only in one line in the last paragraph of the opinion. *Id.* at 295. The Court described its holding in *Mitchell* as supported by "abundant pointed evidence"—including "detailed and explicit" legislative history (at a time when the Court placed great weight on such authority), *id.* at 293, 296, and so any interpretive presumption was irrelevant. The Court in *Arnold v. Ben Kanowsky, Inc.*, 361 U.S. 388 (1960), likewise recited the canon in passing, but it did not need to rely on the canon because it found the answer to the interpretive question to be "clear." *Id.* at 393 ("It is clear that respondent does not meet at least two of the three standards . . . ."); *id.* at 391 ("clear legislative history"); *id.* at 394 ("clearly"); *id.* at 392.

In sum, this Court should take the opportunity presented in this case to reject the notion that exemptions to remedial statutes must be narrowly construed, at least as applied to the FLSA.

CONCLUSION

For the foregoing reasons and those stated by Petitioner, the Ninth Circuit's decision should be reversed.

Respectfully submitted,

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No. 16-1362

IN THE

Supreme Court of the United States

ENCINO MOTORCARS, LLC,

Petitioner,

v.

HECTOR NAVARRO; MIKE SHIRINIAN; ANTHONY PINKINS; KEVIN MALONE; AND REUBEN CASTRO,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether service advisors at car dealerships are exempt from the FLSA's overtime-pay requirements pursuant to 29 U.S.C. § 213(b)(10)(A)?

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BRIEF OF THE INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

INTEREST OF *AMICUS CURIAE*

The INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO ("IAM") is a labor organization of nearly 600,000 members, representing workers across the United States.[1] It represents employees in various industries including manufacturing, aerospace and shipyards. Its particular interest in this case is that it has long represented employees in service departments of automobile dealerships, going back to at least the 1940s. As of this date, IAM represents over 35,000 employees in automotive industries, mainly automobile dealerships, across the country.

IAM's primary representation of employees in automobile dealerships has been of service mechanics. Its representation, however, has also included partsmen, service advisors, parts runners, dispatchers, bodymen, lot persons and the many additional classifications who work in the varying configurations in service departments of different dealers throughout the country.

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[1] No counsel for a party authored this *amicus* brief in whole or in part, and no person or entity, other than the *amicus*, made a monetary contribution to the preparation or submission of this brief.

IAM has been in the forefront of organizing employees in service departments. As a result, through its affiliated District and Local Lodges, the IAM has participated in hundreds of National Labor Relations Board (NLRB) proceedings involving unit determinations concerning mechanics, service advisors and other job classifications in service departments.

IAM's interest in this case is ensuring that service advisors whom it currently represents, as well as those whom it seeks to organize, are not exempt from overtime under the Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201–219. IAM is also concerned that any expanded reading of the exemption at 29 U.S.C. § 213(b)(10)(A) would affect the many other classifications of employees it represents and seeks to organize in service departments.

Amicus Curiae brings a specific perspective to this Court. Rather than present argument about the meaning of the Fair Labor Standards Act, we explain how the NLRB, in representation proceedings, has treated service advisors; automobile salesmen and other members of the sales department; and mechanics and other members of service departments in various dealerships over the long and rich history of reported decisions. These decisions provide an even-handed view of the work performed in service departments, how that work is divided amongst classifications, the operation of dealerships, the wages and methods of compensation for various classifications and, of particular interest, the work of service advisors. This review should assist the Court in understanding the nature of service advisor work and why it makes sense that they are not encompassed within the exemption from overtime at issue.

I. STATEMENT OF THE CASE

Respondents brought an action under the Fair Labor Standards Act, claiming that they were entitled to overtime under federal law. This case is again before the Court without any factual record of what service advisors do in dealerships across the country. The record is limited to the bare allegations of the complaint concerning one dealership. This brief provides a broader context and exploration of the work performed by service advisors and other dealership employees.

Under the provisions of the National Labor Relations Act, 29 U.S.C. §§ 151–169, the NLRB is authorized to determine appropriate bargaining units for the purposes of collective bargaining. *See* 29 U.S.C. § 159(b).

In making these unit determinations, the NLRB has issued hundreds of decisions describing the job duties and working conditions of service advisors and other classifications employed in the service department of automobile dealers. We present analysis from these decisions in support of the Respondents' arguments that the exemption cannot reasonably apply to service advisors and that the Ninth Circuit's decision excluding service advisors from the exemption makes sense both historically at the time the amendments were made by Congress as well as reflected by the current operation of automobile dealerships.

II. SUMMARY OF ARGUMENT

Decisions of the NLRB and Directions of Elections of Regional Directors present a thorough review of job duties and working conditions of employees in automobile dealerships. Because the NLRB is required by statute to make individualized unit determinations each time a question of representation is raised, there is an extensive administrative record examining the operations in automotive service departments from 1938 through the present. Because the unions and employers party to these proceedings have sometimes taken conflicting positions regarding the particular inclusions and exclusions from proposed units, the Board's Decisions present a neutral and accurate record of the nature of the work in service departments including specifically service advisors.

These cases fully explore the job duties of service advisors over the past half century. The work of service advisors is regularly described as the communication link between customers and the mechanics who service their vehicles. Service advisors are uniformly described as having neither the skills nor tools to perform a servicing function. This undermines the argument of Petitioner that service advisors are engaged in the servicing of vehicles. Pet. Br. 25.

Review of NLRB decisions show service advisors coordinate the process of automobile repair for customers and ensure that customers are advised of the status of needed repairs and costs associated with the repairs, and all paperwork is completed properly. Any "selling" is incidental to the main function of serving as a customer liaison. This undermines the argument of Petitioner that service advisors are salesmen. Pet. Br. 27-29.

These same decisions describe the numerous job classifications in use in service departments and the scope of their job duties. Lube technicians, lot attendants, car washers, detailers, cashiers, warranty clerks, parts drivers, parts runners, body shop employees and many other job classifications are employed in addition to mechanics and partsmen in most dealerships. These job classifications do not fit within the FLSA exemption relied upon by Petitioner, and these individuals historically and currently enjoy the overtime protections of the FLSA. This undermines the argument of Petitioner that the exemption is meant to be inclusive of all classifications of the parts and service departments engaged in the core servicing of vehicles. *See* Pet. Br. 34.

Given the variety of job classifications used in dealerships, it is evident that the exemption was not intended to include service advisors. If accepted, the Petitioner's argument regarding the functional integration of service advisors in the servicing of vehicles would result in a *de facto* return to the blanket exemption of 1961 since all employees in the service department are part of the servicing process and NLRB decisions from the 1940s forward identify a variety of service department employees as integral to the repair of a vehicle. Contrary to the Petitioner's position, it would be more disruptive to expand the exemption to include more classifications than to properly exclude one classification that neither services nor sells automobiles.

In summary, this brief addresses the job duties of service advisors and all the other employees in service, sales, and parts departments and explains why the Ninth Circuit's limited reading of the FLSA exemption is consistent with the daily operations of automobile dealerships.

III. ARGUMENT

A. THE NATIONAL LABOR RELATIONS BOARD IS TASKED WITH DETERMINING THE APPROPRIATE BARGAINING UNIT FOR PURPOSES OF COLLECTIVE BARGAINING, 29 U.S.C. § 159(b).

Through the NLRB representation process, a wealth of administrative decisions have been issued describing the classifications, job duties, working conditions and structures of automotive dealerships. These decisions provide a neutral factual description of dealerships over time since at least the early 1940s.

Under the provisions of 29 U.S.C. § 159(b), the NLRB "shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this subchapter, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof . . . ."

The statute also establishes the procedure by which unit determinations are made: "[T]he Board shall investigate such [representation] petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice." 29 U.S.C. § 159(c)(1).

The NLRB has historically employed a community of interest standard in determining the appropriateness of any particular unit.

The leading treatise describes the Board's standard as follows:

> In making judgments about "community of interest" in these different settings, the Board will look at such factors as: (1) similarity in the scale and manner of determining earnings; (2) similarity in employment benefits, hours of work and other terms and conditions of employment; (3) similarity in the kind of work performed; (4) similarity in the qualifications, skills and training of the employees; (5) frequency of contact or interchange among the employees; (6) geographical proximity; (7) continuity or integration of production processes; (8) common supervision and determination of labor-relations policy; (10) history of collective bargaining; (11) desires of the affected employees; (12) extent of union organization.

Robert A. Gorman & Matthew W. Finkin, *Labor Law Analysis and Advocacy* § 5.2, at 103 (3d ed. 2013). *See also NLRB v. Action Auto., Inc.*, 469 U.S. 490, 494 (1985); NLRB, *An Outline of Law and Procedure in Representation Cases* 142-45 (2017).[2]

As a result of application of this established test, nearly all unit determination decisions review each factor as applied to the employees in each job classification.

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[2] Available at https://www.nlrb.gov/sites/default/files/attachments/basic-page/node-1727/OutlineofLawandProcedureinRepresentationCases_2017Update.pdf.

Prior to 1961, hearings were conducted by the Regional Director and the record was submitted directly to the Board for the issuance of a decision. After 1961, decisions were issued by the Regional Directors subject to review by the Board. 26 Fed. Reg. 3911 (1961). The process has been modified recently to speed up and simplify the process but still requires a determination to be made in each case based on its unique facts. 79 Fed. Reg. 74,308 (2014) (codified at 29 C.F.R. pts. 101, 102, and 103).[3]

The Board has considered the placement of service advisors in or out of potential bargaining units sought by unions and in or out of alternative units proposed by employers. These cases provide a body of concrete facts regarding the work of service advisors, other service department employees, and sales department employees. The similarities and differences between service advisors and other employees and the general working conditions of service departments have been described in a manner that offers consistency and accuracy to understand the work of service advisors.

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[3] Some cited cases involve unfair labor practice proceedings, which result in a decision issued by an Administrative Law Judge. These decisions are subject to review by the NLRB if either party files exceptions. *See* 29 U.S.C. § 160. Decisions of the Board are available on the NLRB's website. The Regional Director decisions after 1961 were not published in the official volumes of NLRB Decisions, but are available through the Board's website at https://www.nlrb.gov/search/documents. Reported NLRB Decisions are available on the Board's website at https://www.nlrb.gov/cases-decisions/board-decisions in addition to Westlaw and Lexis.

Employers and unions in these cases have litigated the scope of bargaining units in service departments because service departments contain many different classifications and vary from dealership to dealership. In some cases, the petitioning union or the employer has sought to include service advisors in a unit of service department employees with mechanics. In other cases, either party has sought to exclude service advisors. The cases show a consistent separation between salesmen and other members of the sales department and mechanics and other members of the service department, including service advisors. The term "salesman" is consistently applied only to automobile salesmen in the sales department. Salesmen are routinely organized into appropriate units distinct from the service department, including the service advisors.

The variety of positions taken by the parties to these unit determination proceedings makes these decisions trustworthy to the issues before this Court. These conclusions are generalized from over 300 cases that concern various classifications in dealerships.

B. THE FUNCTION OF SERVICE ADVISORS IS CUSTOMER RELATIONS.

1. The Primary Function of Service Advisors is a Communication Link.

A service advisor is a customer-facing position. He or she provides customer service to people seeking vehicle maintenance and repairs. The primary duties are to record customer concerns regarding their vehicle on a repair order, to provide an estimate on the cost of repairs, and to keep customers informed on the status of their vehicle's repair or maintenance.

In most dealerships, service advisors:

> greet in-coming customers, prepare repair orders, and assign the repair orders to individual [mechanics] . . . . Service advisors are required to have good communication skills and receive special training in dealing with customers. . . . The "advisor" part of their title deals with their relationship with the customer. They do not "advise" or counsel the mechanics on how to diagnose a problem, what cause to eliminate first, or other technical aspects. . . . [T]hey merely serve as the link between customers and mechanic.

McRobert Motor Co., 36-RC-6082, at p. 2 (2001).[4] The primary responsibility of a service advisor is "to greet customers, to find out what problems the customers are experiencing with their vehicles, and to keep the customers informed about the status of their vehicles during the repair process." *Phil Long European Imports, LLC*, 27-RC-8071, p. 5 (2000). *See also Autonation Imports of Longwood, Inc. d/b/a Courtesy Honda* ("*Courtesy Honda*"), 12-RC-083701, p. 5 (2012) ("a liaison"); *Performance of Brentwood LP*, 26-RC-063405, p. 24 (2011) (same); *Crown Motor Co. d/b/a Acura of Memphis* ("*Acura of Memphis*"), 26-RC-

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[4] Citations to the NLRB case numbers reference the Regional Directors' Decision and Direction of Election.

8613, p. 15 (2010) (same). "[C]ustomer service is a critical aspect of the service advisor job." *Big Valley Ford, Inc.*, 32-RC-5370, p. 7 (2005). The job requires "customer-facing skills" to explain repairs that will be performed to the vehicle. *BMW of W. Springfield*, 1-RC-21908, p. 4 (2005).

The duties of the service advisor are generally to generate the necessary documentation for a service to start, commonly referred to as a "repair order," and to ascertain the estimated time and cost to complete a repair. *Arbogast Buick, Pontiac, GMC Truck, Inc.* (*"Arbogast"*), 9-RC-17854, p. 3 (2003). This could be either a mechanical malfunction or, more commonly, scheduled maintenance as recommended by the manufacturer or dealership. A mechanic diagnoses any problems with a vehicle, performs any scheduled maintenance, and conducts a multi-point inspection in order to determine if there are any additional or unidentified problems, which could generate additional potential repairs. *Performance of Brentwood*, 26-RC-063405, p. 24. Based on the findings solely of the mechanic, the service advisor contacts the customer and recommends additional servicing or repairs. *Big Valley Ford*, 32-RC-5370, pp. 12–13.[5] If the customer accepts the proposed additional work, a repair order is generated by the service advisor for the mechanic. *Courtesy Honda*, 12-RC-083701, pp. 7–8. Once the service is completed, the service advisor contacts the customer to advise that the vehicle is ready. *Id.* at p. 8. The completed repair order is then used to compute the billing.

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[5] *Keyes Motors v. Div. of Labor Standards Enforcement*, 197 Cal.App.3d 557, 564 (1987) ("[D]iagnosis and recommendation is no more 'salesmanship' than a plumber's diagnosis and recommendation that an additional pipe is needed to make a repair.")

Since the 1940s, the service advisor has served a customer relations role in the service department but neither services nor sells vehicles. *B.B. Burns Co.*, 85 N.L.R.B. 1025, 1027 (1949) (equating service advisor to a plant clerical position); *Hanna Motor Co.*, 94 N.L.R.B. 105, 107 (1951); *Weaver-Beatty Motor Co.*, 112 N.L.R.B. 60, 62 (1955); *Story Oldsmobile, Inc.*, 140 N.L.R.B. 1049, 1051 (1963).

2. Service Advisors Do Not Sell or Service Automobiles.

The service advisor's duties do not include mechanical work or automobile sales. Employers have argued to the NLRB that the only appropriate bargaining unit is the entirety of the service department because "employees are integrally related to the single function of servicing and repairing automobiles." *Fletcher Jones Las Vegas* ("*Fletcher Jones*"), 300 N.L.R.B. 875, 876 (1990); *Countryway P'ship d/b/a Crown Motors* ("*Crown Motors*"), 14-RC-12430, pp.1–2 (2003) (employer argues that all employees in service, body shop, parts and detail departments are all part of the "vehicle repair process."); *Rush Truck Ctrs. of Cal., Inc.*, 31-RC-8102, p. 9 (2002). This is parallel to the position Petitioner takes in the pending case. Pet. Br. 26.

The NLRB regularly rejects this argument and finds distinct units within the service department because the work is distinct. The decisions consistently find "advisors do not perform vehicle maintenance and repairs." *Courtesy Honda*, 12-RC-083701, pp. 35–36. Service advisors are not qualified to perform servicing work. *Phil Long European Imports*, 27-RC-8071, p. 5. And, "ability to perform repair or mechanical work" is not a job requirement for service advisors. *Sexton Ford Sales, Inc.*, 14-RC-068800, p. 7 (2011).

The service advisor is responsible for securing consent from a customer that a recommended additional service or repair should be performed. *See Contemporary Cars, Inc., d/b/a Mercedes-Benz of Orlando* ("*Mercedes-Benz of Orlando*"), 12-RC-9344, p. 17 (2008), *subsequent decisions* 354 N.L.R.B. No. 72 (2009) and 355 N.L.R.B. 592 (2010), *enforced*, 667 F.3d 1364 (11th Cir. 2012). Some states, like California, require a dealership to contact a customer to provide an estimate of costs and receive explicit authorization for a repair before performing any additional work. *See* Cal. Bus. & Prof. Code § 9884.9; *see, e.g.*, Alaska Stat. § 45.45.140; Conn. Gen. Stat. § 14-65f; Del. Code Ann. tit. 6, § 4904A; Fla. Stat. § 559.905; 815 Ill. Comp. Stat. 306/15; Me. Rev. Stat. tit. 29-A, § 1802; Mich. Comp. Laws §§ 257.1307a, .1307e; Minn. Stat. § 325F.58; N.J. Admin. Code § 13:45A-26C.2; N.M. Code R. § 12.2.6.10; N.Y. Comp. Codes R. & Regs. tit. 15, § 82.5; Wash. Rev. Code §§ 46.71.015, .025. Service advisors are trained to comply with these legal obligations.

Service advisors perform no substantive mechanic work. In some dealerships, a service advisor may perform minor service work, like testing a vehicle's battery, replacing a wiper blade or changing a license plate bulb as a courtesy to a customer. *Acura of Memphis*, 26-RC-8613, pp. 15–16; *N. Bay Saturn Grp., Inc. d/b/a Saturn of Marin* (*"Saturn of Marin"*), 20-RC-17537, p. 5 (1999). Such minor mechanical work "is incidental to their primary duties of greeting customers and preparing the R[epair] O[rder]." *Sexton Ford Sales*, 14-RC-068800, p. 14; *Courtesy Honda*, 12-RC-083701, p. 27. A service advisor would not have the tools or skills to perform more than this incidental work. *Sexton Ford Sales*, 14-RC-068800, p. 7; *State Coll. Ford Lincoln Mercury, Inc.*, 6-RC-12215, p. 7 (2003).

There are important functional reasons why service advisors do not perform vehicle service. First, most are not trained to do the work. *Tinley Park J. Imports, Inc.*, 13-RC-21270, p. 6 (2004). Second, if they were working on a vehicle in a stall, they could not respond to customer inquiries as those stalls are located away from the customer areas and these stalls are assigned to full-time mechanics so there are no available stalls. Third, they would compete with the mechanics for work, an important consideration in flat rate shops where mechanics are paid by the flag hour produced. *See Michael Stead, Inc.*, 32-RC-4789, p. 4 (2000). This would reduce the work available to mechanics and create tension with service advisors who would assign the easy "gravy" work to themselves. Similarly, mechanics do no customer-facing work because it distracts from performing the tasks that generate income for them.

The job duties of service advisors do not include selling either service or vehicles. The primary function of the job is to serve as the communication link between mechanics and customers. *Howard Orloff Imports, Inc.*, 13-RC-21069, p. 2 (2003). Although there is undoubtedly a sales component, no cases describe the job duties of service advisors with sales as the primary responsibility. In addition, the sales portion of the function has limited discretion. The service advisor does not diagnose a vehicle. *See Mercedes-Benz of Orlando*, 12-RC-9344, p. 16. The service advisor records customer concerns as a guide to the mechanic, who diagnoses the problem to determine precisely what work is needed. Alternatively, the service advisor relies on manufacturer provided maintenance menus or service schedules. *Courtesy Honda*, 12-RC-083701, p. 15; *Thomas Motors of Joliet, Inc.*, 13-RC-21966, p. 2 (2010); *Mercedes-Benz of Pembroke Pines*, 12-RC-9290, pp. 9–10 (2008).

As a result, the service advisor serves a reporting function, conveying to the customer the diagnosis of the mechanic or the recommendation of the manufacturer or dealership for routine scheduled maintenance such as an "oil lube and filter" or tire rotation. A service advisor is not, contrary to Petitioner's argument, a "quintessential sales[person]." Pet. Br. 33 (comparing them to pharmaceutical sales representatives described in *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142 (2012)).

Many non-exempt employees are paid on a commission basis and, conversely, being paid a commission does not determine the applicability of this overtime exemption. Many service advisors are paid on a draw against commission system, but that pay plan may include employees from many other classifications who receive a portion of compensation based on either department or dealership-wide performance. This may include dispatchers, detailers, parts drivers, warranty clerks, and bookers with service advisors. *See Mercedes-Benz of Pembroke Pines*, 12-RC-9290, p. 11 (bookers paid on commission); *Tinley Park J. Imports*, 13-RC-21270, p. 6 (detailers paid on flat rate); *Howard Orloff Imports*, 13-RC-21069, p. 4 (dispatchers paid by commission); *Jackson Ford, Inc.*, 7-RC-22545, p. 5 (2003) (lube technicians may receive commission); *Champion Fordland, Inc.*, 4-RC-20177, p. 4 (2001) (warranty clerk earns salary and commissions); *Michael Stead*, 32-RC-4789, p. 3 (parts driver and clerical participate in bonus program). *See also Car City, Inc.*, 116 N.L.R.B. 1571, 1572 (1956) (employer advocating for a unit of all employees, including those in the sales, service and parts departments, as all were entitled to bonuses for securing prospective purchasers of cars and effectively recommending additional needed service and parts).

Similarly, some of the classifications that are usually paid on productivity based systems or on a percentage of sales, may be paid solely on an hourly basis. *See, e.g.*, *Sexton Ford Sales*, 14-RC-068800, p. 9 (some body shop repairmen paid hourly); *Wiers Int'l Trucks*, 25-RC-10389, p. 5 (2007), *subsequent decision* 353 N.L.R.B. 475 (2008) (service technicians, service advisors and parts associates all paid on an hourly basis); *Michael Stead*, 32-RC-4789, p. 3 (service advisors paid hourly with ability to participate in department-wide bonus program).

Additionally, many dealerships have an internal service advisor who only writes repair orders on new cars or used cars that are being readied for sale. *See, e.g.*, *Thomas Motors of Joliet*, 13-RC-21966, p. 3; *Keldeneri Corp.*, JD(SF)-10-07 (2007). They do not have contact with any external customers and do not "sell," as the sole "customer" is the dealership itself. *Mercedes-Benz of Orlando*, 12-RC-9344, p. 16. This position may be hourly. *Azure Auto II, LLC*, 28-RC-160737, p. 3 (2015).

3. Automobile Salesmen are a Separate Appropriate Unit without Inclusion of Service Advisors.

There is a long history of separate units for salesmen in dealerships with both a sales and service department. *See, e.g.*, *Falls Dodge, Inc.*, 171 N.L.R.B. 1580 (1968); *R. James Span*, 189 N.L.R.B. 219 (1971); *Suburban Ford, Inc.*, 248 N.L.R.B. 364 (1980); *Toyota of Walnut Creek, Inc.*, 256 N.L.R.B. 341 (1981); *Winer Motors, Inc.*, 265 N.L.R.B. 1457 (1982); *Lionel G. Sullivan*, 276 N.L.R.B. 999 (1985); *Bridgeway Oldsmobile, Inc.*, 290 N.L.R.B. 824 (1988); *Hayward Dodge, Inc.*, 292 N.L.R.B. 434 (1989); *Southwick Grp.*, 306 N.L.R.B. 893 (1992). There is no history of service advisors being included in a unit of sales department employees.

Larry Faul Oldsmobile Co., 262 N.L.R.B. 370 (1982), addresses the issue of other sales personnel in a dealership. In addition to the automobile salespersons, the dealership also employed finance and insurance salespersons. Like the automobile salespersons, the finance and insurance salespersons received weekly salaries, commissions, monthly bonuses and annual bonuses. *Id.* The Board determined, although they sold a different product, they were integrated with the automobile salesmen. *Id.* at 371. Also included in the unit were the fleet sales administrator, lease receptionist and the inventory control clerk/receptionist, who was deemed "integral to the selling process." *Id. See also Merry Oldsmobile, Inc.*, 287 N.L.R.B. 847 (1987) (including after sales salespersons in sales unit, excluding other sales department employees).

Other sales department employees have traditionally been afforded the protections provided by FLSA. The sweeping interpretation of the exemption that the Petitioner advocates for based on service advisors being "integral to the servicing process," would also mean that "receptionists" are "integral" to the sales process and porters are "integral to the service process." Pet. Br. 28, 31, and 42. Regardless, the test for application of the exemption is not whether the role of the employee is "integral" to the servicing or selling "process" but rather whether the employee is "primarily engaged" in servicing or selling. The receptionists and porter are not primarily engaged in selling or servicing. Under the Petitioner's expansive interpretation of the exemption, many additional classifications would be swept into the otherwise limited exemption notwithstanding Petitioner's stated position to the contrary. 15-415 Cert. Reply Br. 7, n.2.

C. DEALERSHIPS IN THE 1960s AND EARLIER EMPLOYED MANY POSITIONS IN THE SERVICE AREA IN ADDITION TO THE TWO SPECIFIED EXEMPT POSITIONS.

The Board has considered the job functions of service advisors since the 1940s and 50s. *See B.B.*

Burns Co., 85 N.L.R.B. at 1027; *Hanna Motor Co.*, 94 N.L.R.B. at 107; *Weaver-Beatty Motor Co.*, 112 N.L.R.B. at 62; *Story Oldsmobile, Inc.*, 140 N.L.R.B. at 1051. When Congress was debating the scope of the FLSA exemption, service advisor was already an established and well-known service department position.

Dealerships in the 1960s used multiple job titles when referring to their service department employees, and the job title of service writer/advisor was already in wide-spread use. *See Trevellyan Oldsmobile Co.*, 133 N.L.R.B. 1272 (1961). In *Trevellyan*, mechanics and their helpers were determined to be a separate appropriate unit, and a second, distinct unit of non-mechanic service department employees, including service advisors, lubemen, body repairmen, painters, polishmen, motor riders, countermen and janitors was also found to be appropriate. *Id.* at 1273. The service advisors were explicitly excluded from the ranks of mechanics and included with other, FLSA non-exempt, service department employees.

Other service department employees have been found to be "integral to the servicing process" and performing the "core" goals of the service department, yet are not exempt. In 1949, the Board determined that all of the positions "directly connected with the servicing of automobiles" formed an appropriate unit. *B.B. Burns Co.*, 85 N.L.R.B. at 1026. This included mechanics, body and fender men, grease-rack men, the wash-rack man, the errand boy and the service advisor. *Id.* at 1027. The errand boy (now sometimes a lot jockey, parts runner, etc.) has been necessary to service operations since at least 1949. These positions are important to mechanics; preventing a loss of time and money under the flat rate system due to time spent performing non-mechanical tasks. *See Gonzalez v. Downtown LA Motors, LP*, 215 Cal.App.4th 36, 41-42 (2013). Thus, these lot jockeys are part of the "core" service function but are not exempt and Petitioner does not assert otherwise.

In a 1965 case, the Board found the classification titles of "service writer, line mechanics, new car get ready and new car detail mechanics, used-car mechanics, body-and-fender men, painters and helpers, parts department men, and lubrication, pickup, and delivery men" to be in use in a single dealership. *See W.R. Shadoff*, 154 N.L.R.B. 992, 993 (1965). Similarly, in 1962, the job titles of service writer, dispatcher, automotive line mechanics, porters, paint and body shop mechanics, new car get-ready, used car make-ready, and parts department were in use. *See Austin Ford, Inc.*, 136 N.L.R.B. 1398, 1399–1400 (1962). This adds to job titles that were already identified in 1950 of lube man, group leaders, wing man, car washers, service station attendant, polishers, and car jockey. *Fuller Auto. Co.*, 88 N.L.R.B. 1452 (1950); *Teague Motor Co.*, 91 N.L.R.B. 1149, 1150 (1950).

As demonstrated above, through the 1960s, classifications beyond mechanics and partsmen "servicing and repairing customers' automobiles" were working in service departments, and similarly, more classifications than just salesmen were "preparing cars for sale to the public" in either service or sales departments. *See W.R. Shadoff*, 154 N.L.R.B. at 994.

The Petitioner's argument that these broad functions define the scope of the FLSA exemption should be rejected. Pet. Br. 28-29; 34. To accept the position would be a return to the 1961-1966 blanket exemption adversely impacting tiremen, car washers, errand boys, polishers, lubemen and the many other classifications that have been identified. *See Adams Motors*, 80 N.L.R.B. 1518 (1948).

The historical use of a variety of job classifications is recorded more than a decade before the 1961 exemption was enacted. In *Fuller Automobile Co.*, 88 N.L.R.B. at 1453, job titles of control clerk, parts panel salesmen, office clerical employees, body shop employees, foremen, service writers, watchman, swing man and car jockeys were identified as part of the servicing organization. If Congress intended to include these individuals into the scope of the overtime exemption, the language of the exemption would have included these well-established separate classifications.

The use of multiple classifications beyond those specified in the FLSA exemption is not limited to the service area. In new car sales, a dealership may employ finance and insurance salesmen in addition to automobile salesmen. *Parker-Robb Chevrolet, Inc.*, 262 N.L.R.B. 402, 410 (1982) (excluding finance and insurance salesmen from unit of automobile salesmen), *review denied on unrelated issue, Auto. Salesmen's Union Local 1095 v. NLRB*, 711 F.2d 383 (D.C. Cir. 1983); *Larry Faul Oldsmobile*, 262 N.L.R.B. 370 (finance and insurance salesmen who are in new car, used car and lease departments included in unit of automobile salesmen); *see also Cutter Dodge,* *Inc.*, 278 N.L.R.B. 572, 575 (1986) (excluding outside parts salesmen).

The same analysis can be applied outside of automobile dealerships in enterprises subject to the same exemption. In one of the few farm implement dealership cases, the company was engaged in the "retail sale, service, and repair of farm machinery and farm implements." *Missco, Inc.*, 116 N.L.R.B. 1213 (1956). The only job titles sought by the union to be included in an appropriate unit were "mechanics, helpers, assemblers, parts employees, truckdrivers, painters, and janitors." *Id.* at 1214. The employer sought to add the bookkeeper and salesmen. *Id.* There were no service advisors, presumably because the position is not necessary at a facility selling and repairing farm implements. *See also Valley Truck & Tractor Co.*, 80 N.L.R.B. 444 (1948) (finding, at a farm implement service location, an appropriate unit of mechanics, mechanics' helpers, warehousemen, and partsmen, excluding clerical employees, salesmen, and supervisors).

D. EVERY SERVICE DEPARTMENT INCLUDES MANY NON-EXEMPT CLASSIFICATIONS OF EMPLOYEES.

A modern auto dealership's service and parts department includes many classifications in addition to those specifically listed in 29 U.S.C. § 213(b)(10)(A). A review shows the regular usage of at least twenty interrelated and potentially overlapping functions in a well-staffed service department. Only the mechanics and partsmen are included in the FLSA exemption. Dealerships often have other departments, such as lease departments, fleet sales and used car departments, which encompass additional non-exempt classifications.

1. The Historical Additional Classifications of Service Department Employees.

As early as 1950, multiple job titles in addition to service advisors and mechanics existed and were in regular use in service departments. These titles include the car jockey, lube man (or lubrication man), group leader, painter, wing man, electrician, body and fender man (or body repairman), apprentice, helper, car washer, polisher, service station attendant, porter, underseal man (or undersealer), tire changer, service department cashier, parts department cashier, parts department manager, new car get-ready man, used car reconditioning mechanic, used car cleaner, general utility employee, shag boy, trim man, inventory clerk and shipping clerk. *Fuller Auto. Co.*, 88 N.L.R.B. at 1460; *Teague Motor Co.*, 91 N.L.R.B. at 1150; *Hanna Motor Co.*, 94 N.L.R.B. at 107 n.2; *O.Z. Hall Motors, Inc.*, 94 N.L.R.B. 1180 (1951); *Weaver-Beatty Motor Co.*, 112 N.L.R.B. at 62.

At the time of the enactment and limiting modification to the dealership exemption, the service and parts departments were clearly much broader than mechanics, partsmen, and service advisors.

2. The Modern Classifications of Service Department Employees.

The most common classification inside the service department is a mechanic, more recently referred to as a service technician. *Phil Long European Im-*

ports, 27-RC-8071, p. 3 n.3. The mechanic is a skilled position, and mechanics on their own may form a craft unit. *Courtesy Honda*, 12-RC-083701, pp. 25–26. However, over time, the skills and function of mechanics have changed. Now, most parts are replaced rather than repaired. *Clay Chevrolet, Inc.*, 1-RC-21570, p. 3 (2002). Also, based on the increase in electronic components in vehicles, the most frequently used "tool" for a mechanic includes a diagnostic computer. *Courtesy Honda*, 12-RC-083701, p. 11. Mechanics usually have their own tools and tool boxes, the value of which can exceed $50,000. *Jackson Ford*, 7-RC-22545, p. 4; *Oliver C. Joseph, Inc.*, 14-RC-12830, p. 8 (2011). Mechanics earn certifications from either the manufacturer or the National Institute for Automotive Service Excellence (ASE). *Fletcher Jones*, 300 N.L.R.B. 875; *Performance of Brentwood*, 26-RC-063405, p. 10; *Big Valley Ford*, 32-RC-5370, p. 6; *Saturn of Marin*, 20-RC-17537, p. 6. No one else in the dealership does the work of the mechanic, and the mechanic does not do the work of any other classification. *Fairfield Ford*, 9-RC-17713, p. 3 (2002), *subsequent decision* 340 N.L.R.B. No. 9 (2003), *review denied, enforced*, 116 F. App'x 601 (6th Cir. 2004). This makes sense because of the skill sets involved and the higher wages of mechanics.

In addition to highly-trained mechanics, there are likely to be lesser skilled technicians known as lubricators, lube technicians, express techs, or lube and oil technicians. Their work is frequently limited to oil and other fluid changes, changing belts or filters, rotating tires or other simple servicing work. *Fletcher Jones*, 300 N.L.R.B. at 876; *Courtesy Hon-*

da, 12-RC-083701, p. 14; *Arbogast*, 9-RC-17854, p. 3. Lube technicians are generally paid on an hourly basis and are not exempt from overtime. *Fletcher Jones*, 300 N.L.R.B. at 876; *Junction Buick Pontiac GMC-Truck*, 8-RC-16059, p. 4 (2000). These employees are often employed in "quick lane" or "quick service" areas, geographically separate from the rest of the service department. *Academy LLC*, 27-RC-8320, p. 4 (2004).

There may also be pre-delivery inspection technicians who do not perform mechanical work but simply inspect and prepare new vehicles for customers to pick up. *Royal Gate Dodge, Inc.*, 14-RC-12420, pp. 6–7 (2003). This position is sometimes referred to as a "get ready technician" or "new car cleanup employee" or "internal technician." *Fletcher Jones*, 300 N.L.R.B. at 876; *Dick Bullis, Inc.*, 176 N.L.R.B. 158, 158 (1969); *Performance of Brentwood*, 26-RC-063405, p. 23; *Arbogast*, 9-RC-17854, p. 4; *Acura of Memphis*, 26-RC-8613, p. 13.

The pre-delivery inspection work may also be performed by a "detailer." *Tinley Park J. Imports*, 13-RC-21270, p. 6. But a detailer may also refer to an individual who provides a deep clean and wash to a vehicle and repairs minor paint scratches for either existing customers or in preparation for selling a pre-owned vehicle. *Performance of Brentwood*, 26-RC-063405, p. 19; *Mercedes-Benz of Orlando*, 12-RC-9344, p. 14; *Saturn of Marin*, 20-RC-17537, p. 4. Detailers are paid on an hourly basis. *Oliver C. Joseph*, 14-RC-12830, p. 12; *Saturn of Marin*, 20-RC-17537, p. 7. There may also be a car washer or wash rack employee who washes cars that have been serviced before the vehicle is returned to the customer. *Sexton Ford Sales*, 14-RC-068800, p. 8.

Some dealerships will have a dispatcher who keeps track of the work and assigns the work to the mechanics by evaluating the nature of the work, the skills of the mechanics and availability. *Fairfield Ford*, 9-RC-17713, p. 4. *See also Austin Ford*, 136 N.L.R.B. at 1399. In older parlance, they were known as "towermen," inherited from other settings where some sat in a tower to monitor the flow of work. *See Dick Bullis*, 176 N.L.R.B. at 158. Other dealerships may call this position a "workflow coordinator." *Performance of Brentwood*, 26-RC-063405, p. 26. This individual may have no mechanical certifications but may earn commission off of the total labor sold in the service department. *Sexton Ford Sales*, 14-RC-068800, p. 8. In some dealerships, the service advisors may serve this function. *Sacramento Auto. Ass'n, Valley Motor Car Dealers Council*, 193 N.L.R.B. 745, 746 (1971); *Q&S Auto., LLC*, 32-RC-5403, p. 10 (2006).

A dealership may also employ a quality control person. This person reviews repaired vehicles but does not usually perform repair work. *Fletcher Jones*, 300 N.L.R.B. at 875. This individual can be paid hourly and receive overtime. *Life Quality Motor Sales, Inc.*, 29-RC-9173, pp. 26–28 (1999).

Some dealerships employ an appointment taker/scheduler. *Courtesy Honda*, 12-RC-083701, p. 17; *Mercedes-Benz of Orlando*, 12-RC-9344, p. 5; *Life Quality Motor Sales*, 29-RC-9173, p. 11.

A service department will have clerks and/or cashiers. The cashiers accept payment from customers and may file documents and/or pick up phones for the service department. *Phil Long European Imports*, 27-RC-8071, p. 2 n.2; *Arbogast*, 9-RC-17854, p. 4. Clerks or administrators process paperwork associated with repairs, including warranty payments from manufacturers. *Arbogast*, 9-RC-17854, p. 4; *Courtesy Honda*, 12-RC-083701, p. 2. Each is generally an hourly, non-exempt position but at some dealerships may be salaried. *Acura of Memphis*, 26-RC-8613, pp. 17–18 (hourly); *Crown Motors*, 14-RC-12430, p. 6 (same); *Life Quality Motor Sales*, 29-RC-9173, pp. 29–31 (same); *but see Fairfield Ford*, 9-RC-17713, p. 3 (salaried).

There may be a "booker" who "books" or closes repair orders and ensures that technicians are properly paid under the flat rate pay system. *See Mercedes-Benz of Orlando*, 12-RC-9344, pp. 7, 20. This job may be referred to as a "flagger" in reference to the flat rate hours "flagged" by a mechanic. *Sexton Ford Sales*, 14-RC-068800, p. 8.

There are also porters, lot porters, valets, or car jockeys. *Pflueger Auto Grp., LLC*, 37-RC-4120, p. 7 (2005) (service lot technicians); *Arbogast*, 9-RC-17854, p. 3. Their main function is to move vehicles either from the customer service entrance of the dealership to a mechanic's stall or a lot, or from the lot to a stall or back to the customer. These employees also help to maintain cleanliness in the service area. *Academy LLC*, 27-RC-8320, p. 10. A porter may also top off fluids, such as windshield wiper fluid or anti-freeze. *Courtesy Honda*, 12-RC-083701, p. 6. They are paid on an hourly basis and are eligible for overtime. *BMW of W. Springfield*, 1-RC-21908, p. 7; *Junc-*

tion Buick Pontiac GMC-Truck, 8-RC-16059, p. 4; *Acura of Memphis*, 26-RC-8613, p. 17; *Life Quality Motor Sales*, 29-RC-9173, pp. 10–11.

The dealership may also employ a "shuttle driver" or "courtesy driver" who is responsible for transporting customers to and from the facility. *Courtesy Honda*, 12-RC-083701, p. 2; *see Mercedes-Benz of Orlando*, 12-RC-9344, p. 22; *Mercedes-Benz of Pembroke Pines*, 12-RC-9290, p. 11. In a large dealership, there may also be a service greeter who directs customers to the appropriate service advisor. *See Mercedes-Benz of Orlando*, 12-RC-9344, p. 5.

Although mechanics are generally required to keep their own work areas clean, most dealerships either employ janitorial staff or contract with an outside agency to provide on-going cleaning services. The janitor is usually placed within the service department even if her duties extend into the sales areas. *See Country Ford Trucks, Inc.*, 32-RC-4617, p. 3 (1999), *subsequent decision* 330 N.L.R.B. 328 (1999), *review denied*, 229 F.3d 1184 (D.C. Cir. 2000). This job is hourly and non-exempt. In some dealerships, the individual performing this work may be called a maintenance employee, and the job may also include facilities or equipment maintenance. *Frank Buck Motors*, 4-RD-2121, p. 4 (2007).

In short, even in 1949, the service department could include many non-mechanics, non-service advisors who were directly related to the service process. *B.B. Burns Co.*, 85 N.L.R.B. at 1027. As the progression of these classifications is reflected in NLRB decisions, the same is true fifty years after the Congressional elimination of the exemption for automobile dealers and the creation of the limited exemptions in 1966. *See Worthington Chevrolet, Inc.*, 271 N.L.R.B. 365 (1984) (including in the mechanical sub-department of the service department service advisors, dispatchers, mechanics, cashiers, warranty clerks and lot persons).

3. Historical Classifications in the Parts Department.

The parts department generally includes more than just partsmen, and the work of partsmen is an evolving hybrid between sales and service.

Some partsmen performed traditional mechanic functions. They could "dismantle engines and transmissions to obtain needed parts, fabricate and improvise parts, and assist mechanics in adjusting substitutes for unavailable standard automobile parts." *Austin Ford*, 136 N.L.R.B. at 1400.

Historically, although not presently, some partsmen came from the ranks of the mechanics. *See, e.g.*, *Harrys Cadillac-Pontiac Co.*, 81 N.L.R.B. 1, 4 (1949) ("It is not uncommon for a mechanic to become a parts man, as 'a good parts man is also a good mechanic.'"). As parts have become standardized with UPC codes, the necessary skills of a partsman have become diminished, and there is minimal interchange between the positions of partsman and mechanic. *See, e.g.*, *Michael Stead*, 32-RC-4789, p. 4; *Courtesy Honda*, 12-RC-083701, p. 23.

Traditionally, a larger parts department includes more than just partsmen. As early as 1956, a parts department could include parts pickers, inventory employees, countermen, stock control clerks, and parts office clerical employees. *Herman M. Brown Serv. Co.*, 115 N.L.R.B. 1371, 1373 (1956).

Thus, at the time the FLSA exemption was changed, the parts department was more than just partsmen, but a choice was made by Congress to limit the exemption to only the partsmen.

4. Modern Classifications in the Parts Department.

The service department may or may not include the parts department, which may be its own standalone department. The modern parts department is generally staffed by partsmen who may be called a retail or wholesale parts counter employee or a parts advisor. *Courtesy Honda*, 12-RC-083701, p. 2; *Phil Long European Imports*, 27-RC-8071, p. 7. A partsman generally works at the back counter, which opens to the shop where the mechanics work, or the front counter, which opens into the dealership to an area where customers may purchase accessories or parts. *Michael Stead*, 32-RC-4789, pp. 2–3. These individuals take part orders from mechanics, members of the public or outside companies (including body shops and independent repair shops) and provide the parts. *Courtesy Honda*, 12-RC-083701, p. 20. There may be a third counter specific to the body shop. *Hall Chevrolet*, 5-RC-126386, p. 14 (2014). Historically, some partsmen had mechanical responsibilities in repairing parts, but recent unit determination decisions do not reference any mechanical tasks associated with the job probably because of the "remove and replace" repair process. *Compare Austin*

Ford, 136 N.L.R.B. at 1400, *with Courtesy Honda*, 12-RC-083701, pp. 19–20.

In a larger parts department, there are other employees in addition to traditional partsmen. The stocker, stockroom clerk, or shipping and receiving employee confirms receipt of ordered parts or accessories, stores incoming parts and re-packages used parts for recycling, return to the manufacturer or other disposal. *See Arbogast*, 9-RC-17854, p. 4; *Michael Stead*, 32-RC-4789, pp. 2–3. These individuals may also be called warehouse employees. *Frank Buck Motors*, 4-RD-2121, p. 5. This is generally an hourly paid position. *Pflueger Auto Grp.*, 37-RC-4120, p. 11; *Life Quality Motor Sales*, 29-RC-9173, p. 8.

The parts driver may pick up a needed part from an offsite warehouse maintained by the employer, another dealership or a parts retailer. Similarly, the driver may deliver parts to another dealer or repair shop for sale. *Courtesy Honda*, 12-RC-083701, p. 21; *see also Gregory Chevrolet, Inc.*, 258 N.L.R.B. 233 (1981). This is an hourly position. Some dealerships employ a parts runner who delivers parts inside the shop from the partsman to the mechanic. *See Mercedes-Benz of Orlando*, 12-RC-9344, p. 7.

Some dealerships employ an administrative assistant, cashier or clerical dedicated to the parts department. *See, e.g.*, *Michael Stead*, 32-RC-4789, p. 3. There may be a parts warranty clerk. *Payton-Wright Ford, Inc.*, 16-RC-10539, p. 7 (2003). The parts driver, runner, clerk and administrative assistant are hourly, non-exempt positions. *Michael Stead*, 32-RC-4789, p. 3; *Azure Auto II*, 28-RC-160737, p. 3; *Sexton Ford*

Sales, 14-RC-068800, p. 11; *Pfleuger Auto Grp.*, 37-RC-4120, p. 11.

5. Classifications in the Body Shop.

Some dealerships operate a body shop or collision center as part of the service department. A body shop, generally in a separate area, is used for painting, frame adjustment, and repairs. *Arbogast*, 9-RC-17854, p. 6; *Payton-Wright Ford*, 16-RC-10539, p. 1. Employees of the body shop repair vehicles but do not service vehicles within the terms of the FLSA exemption.

Body shop technicians will do collision and paint repair work. They straighten metal, utilize body filler and grinders to repair damage, smooth and sand repaired areas, and match paint. These employees may be paid on a flat rate basis or receive hourly pay. *Arbogast*, 9-RC-17854, p. 6 (flat rate pay); *Life Quality Motor Sales*, 29-RC-9173, p. 6 (hourly pay). This is a different skill set and craft from the automotive mechanic. *Big Valley Ford*, 32-RC-5370, p. 13.

The body shop may include an automotive painter to re-paint those sections of the vehicle that have been repaired. *Sexton Ford Sales*, 14-RC-068800, p. 10. This position may be paid based on revenue produced. *Id.*; *Arbogast*, 9-RC-17854, p. 7. It could also be paid as an hourly wage with an incentive for work produced. *Royal Gate Dodge*, 14-RC-12420, p. 10. The painter may have an hourly paid assistant or helper. *Sexton Ford Sales*, 14-RC-068800, p. 11.

The body shop may employ a detailer who cleans, washes, waxes and buffs cars but does not perform body work. *Life Quality Motor Sales*, 29-RC-9173, p. 7. This detailer would be separate from the service department detailer or car washer. *Bradley Chevrolet, Inc.*, 25-RC-10146, pp. 5, 6 (2002).

Automobile dealer body shops have an "estimator" who performs some of the functions of a service advisor. *Payton-Wright Ford*, 16-RC-10539, p. 3. The estimator provides an estimate on the cost of body repair and the expected date of returning a car to a customer. *Hall Chevrolet, LLC*, 5-RC-126386, p. 12. Frequently, these estimates are prepared for insurance companies who must authorize the repairs. *Royal Gate Dodge*, 14-RC-12420, p. 9. There is a limited sales function in preparing estimates.

There may be a separate porter and secretary designated for the body shop department. *Crown Motors*, 14-RC-12430, p. 6. Both of these are hourly positions. *Id.* at p. 7.

E. THE DIVERSITY OF JOB FUNCTIONS IN A DEALERSHIP SUPPORTS A LIMITED AND NARROW READING OF THE OVERTIME EXEMPTION.

Because of the diversity of functions of other classifications employed in a dealership, the exemption should be read as written, including only the specified classifications of mechanic and partsmen, which are constant across dealerships. The Petitioner would exclude many classifications from the FLSA protections they have enjoyed since Congress eliminated the wholesale exemption from auto dealers in 1966.

The justification provided to exempt partsmen and mechanics from the FLSA overtime requirements arises from the potential for on-call work to be performed at irregular or seasonal hours at the site of a disabled vehicle including trucks and farm implements. *See* 15-415 Resp. Br. 32–35. This is particularly reflected in the legislative history connected to partsmen and their role in maintaining farm implements. This rationale could not be applied to service advisors or any other classifications of employees in a service department. Nonetheless, the Petitioner argues that service advisors should be read into the statute based on either their functional integration in the servicing of vehicles or their work selling the servicing of vehicles. Pet. Br. 34.

A typical dealership employs a multitude of exempt and non-exempt employees in the service department. *See UAG-Stevens Creek II, Inc.*, 32-RC-108320, p. 4 (2013); *Courtesy Honda*, 12-RC-083701, pp. 1–2; *Payton-Wright Ford*, 16-RC-10539, p. 1. Each is integrated into the servicing of customers and their vehicles.

The examples, which include more than twenty distinct classifications within dealerships, demonstrate the error of expanding the exemption of 29 U.S.C. § 213(b)(10)(A) to include classifications beyond salesman, partsman and mechanic. They also demonstrate that all these other classifications existed in 1966 through 1974 and Congress declined twice to include them in the exemption. Given the scope of job duties and job titles that exist in dealerships described in the NLRB cases, a narrow reading of the exemption is more consistent with the industry.

IV. CONCLUSION

The Court should affirm the judgment of the court of appeals.

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In the Supreme Court of the United States

ENCINO MOTORCARS, LLC,
Petitioner,
v.
HECTOR NAVARRO, MIKE SHIRINIAN, ANTHONY PINKINS,
KEVIN MALONE, AND REUBEN CASTRO,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

BRIEF OF U.S. SENATORS PATTY MURRAY, SHERROD BROWN, AND JACK REED AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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December 15, 2017

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INTEREST OF *AMICI CURIAE*

Amici are United States Senators Patty Murray (Washington), Sherrod Brown (Ohio), and Jack Reed (Rhode Island).[1] They have a strong interest in ensuring the Fair Labor Standards Act (FLSA) is interpreted correctly. Senator Murray is the ranking member of the Senate Committee on Health, Education, Labor, and Pensions (HELP), which has jurisdiction over the FLSA. Senators Brown, Reed, and Murray, along with other Members of Congress, submitted a comment on the Department of Labor's 2008 proposed rule regarding Section 13(b)(10)(A) of the FLSA. *See* Letter from Members of Congress to Richard M. Brennan at 7 (Sept. 26, 2008), https://goo.gl/NhqhMx.

Amici are intimately familiar with Congress's intent in creating the FLSA's workplace protections and crafting narrow exemptions from those protections. They submit this brief to explain how Petitioner's arguments are inconsistent with the FLSA's text and congressional intent.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

When Congress enacted the FLSA in 1938, it "set up a comprehensive legislative scheme," *United States* v. *Darby*, 312 U.S. 100, 109 (1941), to protect American workers in "bold and sweeping terms," *Powell* v. *U.S. Cartridge Co.*, 339 U.S. 497, 516–17 (1950). Congress's "basic objectives" were to "prohibit 'labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers'" through "substantive wage, hour, and overtime standards." *Kasten* v. *Saint-Gobain Performance Plastics Corp.*, 563 U.S. 1, 11 (2011) (quoting 29 U.S.C. § 202(a)).

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[1] Counsel for Petitioner and Respondents have filed blanket consents to the filing of *amicus* briefs. No counsel for a party authored this brief in whole or in part, and no person or entity other than *amici* or their counsel made a monetary contribution to the preparation or submission of this brief.

The FLSA requires covered employers to pay one and one-half times an employee's regular rate of pay for each hour the employee works beyond forty per workweek. 29 U.S.C. § 207(a)(1). Section 13(b)(10)(A) of the statute, however, exempts automobile dealerships from the overtime provision as to three limited occupations: "any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles." 29 U.S.C. § 213(b)(10)(A).

Because "[b]readth of coverage was vital to" the FLSA's "mission," exemptions from its requirements are "narrow and specific." *Powell*, 339 U.S. at 516. The exemption at issue here is no different. Yet Petitioner proposes a fourth exempt occupation: service advisors. Petitioner's interpretation does violence to Section 13(b)(10)(A)'s text, distorts its history, and invites the Court to override Congress's policy judgments and clear intent.

First, the text. To fall under Section 13(b)(10)(A)'s exemption, a "salesman, partsman, or mechanic" must either "sel[l]" automobiles or "servic[e]" them. No other option is available. And service advisors neither sell nor service automobiles. Instead, as Petitioner admits, at most they sell servicing performed by others. *Encino Motorcars, LLC* v. *Navarro*, 136 S. Ct. 2117, 2121 (2016); Pet. Br. 1, 29. Section 13(b)(10)(A) does not cover the selling of automobile servicing, so this should be the end of the matter.

Petitioner nonetheless contends that the statutory exemption *should* cover service advisors because, Petitioner asserts, they are salesmen who are "integral to the process of servicing vehicles" performed by others. Pet. Br. 23. According to Petitioner, "it makes no sense to hold that service advisors are non-exempt." *Id.* at 29. But it was for Congress to decide whether such an exemption was warranted, not Petitioner or the courts. Congress made that decision when it enacted the exemption, the plain terms of which do not cover service advisors. The Court should respect Congress's policy choice.

If the text of Section 13(b)(10)(A) left any doubt whether service advisors are exempt, statutory and legislative history eliminate it. Section 13(b)(10)(A) replaced an earlier exemption that covered *all* employees of automobile dealerships. As Congress considered which automobile dealership employees should be exempted from overtime protections, legislators discussed the responsibilities of salesmen, mechanics, and partsmen, and understood them to be different than those of service advisors. Indeed, a contemporaneous version of the Department of Labor's Occupational Outlook Handbook, a dictionary that defines occupations in particular industries, distinguished the job of service advisor from the jobs of salesman, mechanic, and partsman. With this background understanding, Congress deliberately drafted Section 13(b)(10)(A) to cover salesmen, mechanics, and partsmen, but not service advisors.

Congress had good reasons to do so. It exempted salesmen, mechanics, and partsmen because they regularly worked off-site during irregular hours, making it hard for employers to calculate their overtime obligations. Service advisors, in contrast, worked regular hours on dealership grounds, so they did not present the same concern. Petitioner's alternative explanations for the exemption lack support in the legislative history and are inconsistent with the FLSA's other provisions.

The narrowing of the exemption in Section 13(b)(10)(A) is consistent with the FLSA's evolution in general. Over the years, Congress has expanded the FLSA's protections while limiting its exemptions. It is this repeated and consistent statutory history that justifies the Court's practice of interpreting FLSA exemptions narrowly. The Court should not disregard the lines Congress has drawn by interpreting Section 13(b)(10)(A) more broadly than its text requires. The Court should defer to Congress's design and affirm the decision of the Court of Appeals.

ARGUMENT

The Court construes a statute's provisions "in their context and with a view to their place in the overall statutory scheme." *Utility Air Regulation Grp.* v. *EPA*, 134 S. Ct. 2427, 2441 (2014) (internal quotation marks omitted). The Court should also analyze relevant statutory and legislative history. *See Warger* v. *Shauers*, 135 S. Ct. 521, 527 (2014); *CSX Transp., Inc.* v. *McBride*, 564 U.S. 685, 695 (2011).

Here, all indicia of congressional intent lead to the same conclusion: Service advisors are not exempt from the FLSA's overtime protections.

I. Section 13(b)(10)(A), By Its Terms, Does Not Cover Service Advisors.

1. Section 13(b)(10)(A) exempts from the FLSA's overtime protections "any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles." 29 U.S.C. § 213(b)(10)(A). The parties spend considerable time debating whether this text should

be read to pair "salesman" only with "selling," or with both "selling" and "servicing."[2] As Respondents and the Court of Appeals explain, the first reading is the most natural and best honors ordinary usage. *See* Resp. Br. 31–39; Pet. App. 16–19.

But even if the statute covers both salesmen who sell and salesmen who service (which, as Respondents explain, is a contradiction in terms), service advisors are still not covered for a simple reason: Section 13(b)(10)(A) only exempts salesmen who are "primarily engaged in selling or servicing *automobiles*," and service advisors are not "engaged in" either activity. To "engage in" an activity is to personally participate in it. Resp. Br. 24 (citing dictionary definitions). This Court regularly uses the phrase "engaged in" to mean personally taking part in certain conduct.[3] Applying that ordinary understanding, what service advisors are "engaged in" is, at most, selling services, not selling or servicing automobiles.

Petitioner concedes, as it must, that service advisors do not sell automobiles. Pet. Br. 37–38. It also tacitly concedes that service advisors do not service automobiles in the ordinary sense of "maintaining" or "repairing" them. Pet. App. 11–12; Resp. Br. 20. Indeed, Petitioner admits that service advisors "are engaged in the selling of the servicing" done by partsmen and mechanics. Pet. Br. 29. That admission is fatal because Section 13(b)(10)(A) does not cover salesmen who, if they sell anything, sell *services* for automobiles, but rather salesmen who sell *automobiles* themselves.

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[2] Respondents also point out that service advisors may not even qualify as "salesmen." Resp. Br. 14–16.

[3] For examples in just the last ten years, see *Henson* v. *Santander Consumer USA Inc.*, 137 S. Ct. 1718, 1723 (2017) (the Court is "engaged in the business of interpreting statutes"); *Millbrook* v. *United States*, 569 U.S. 50, 56 (2013) (law enforcement officers are "engaged in investigative or law enforcement activity" (internal quotation marks omitted)); *FCC* v. *Fox Television Stations, Inc.*, 567 U.S. 239, 244 (2012) (SEC is "not engaged in impermissible censorship"); *Giles* v. *California*, 554 U.S. 353, 359 (2008) ("defendant engaged in conduct designed to prevent [a] witness from testifying" (emphasis omitted)); *United States* v. *Williams*, 553 U.S. 285, 293 (2008) ("children engaged in sexually explicit conduct").

Petitioner argues, nevertheless, that the exemption covers service advisors because selling servicing of automobiles is equivalent to "servicing" them. According to Petitioner, "engaged in . . . servicing automobiles" should be read to mean "engaged in 'sales activities' that 'are integral to the process of servicing vehicles.'" Pet. Br. 13, 26; *see also* Pet. Br. 42 (claiming service advisors are integral to "the servicing process"). This argument rewrites Section 13(b)(10)(A)'s text, which does not include Petitioner's proposed definition of servicing to encompass selling.

The structure of the exemption confirms that Petitioner's interpretation is wrong. "Selling" and "servicing" are, by virtue of being separated by the word "or," distinct categories. *See Loughrin* v. *United States*, 134 S. Ct. 2384, 2390 (2014) ("or" is "almost always disjunctive, that is, the words it connects are to be given separate meanings" (internal quotation marks omitted)). And what salesmen, partsmen, and mechanics "sell" or "service" is "automobiles." Petitioner wants the statute to cover those who, they claim, sell servicing of automobiles, Pet. Br. 29, but the text cannot bear that meaning. "Sell" and "service" refer to "automobiles," not to each other.

Petitioner's approach suffers from another interpretive vice: it reads a dozen words out of the statute. After all, every employee who is "employed by a nonmanufacturing establishment primarily engaged in the business of selling" automobiles, 29 U.S.C. § 213(b)(10)(A), is on some level engaged in the "process" of selling or servicing automobiles. Why else would the car dealership have employed the individual in the first place? Petitioner's approach thus empties of all meaning the statute's prescription that, although they may work for car dealerships, "salesm[e]n, partsm[e]n, [and] mechanics" are exempt only if they are "primarily engaged in selling or servicing automobiles."

2. Petitioner asserts that it "makes no sense" to exclude service advisors from Section 13(b)(10)(A). *E.g.*, Pet. Br. 29, 34. But when Congress adopted that exemption, it concluded otherwise. Petitioner proffers no justification for departing from Congress's judgment.

Petitioner's primary argument is that a service advisor is "in some sense a hybrid" of a salesman and a mechanic. Pet. Br. 34. But a hybrid of A and B is neither A nor B; a hypothetical statute that covered "labradors or poodles" would not apply to labradoodles. And Petitioner's argument does not address the requirement that these supposed hybrids, which are neither salesmen, partsmen, nor mechanics, must still sell or service automobiles.

Petitioner calls it "nonsensical to suggest that an individual primarily engaged in selling the servicing of automobiles is engaged in *neither* selling *nor* servicing automobiles." Pet. Br. 29. That is not nonsensical; it is accurate. Selling servicing is a different activity from either selling automobiles or servicing automobiles. For much the same reason, petitioner's assertion that service advisors "are not engaged in selling or servicing anything other than automobiles," *id.*, is incorrect. Service advisors do not sell automobiles, and they do not service anything at all.[4]

At bottom, what Petitioner is really saying is that service advisors perform tasks that are similar to what salesmen and mechanics do, which should be close enough. But Congress chose its words carefully to enact a narrow carve-out from the FLSA's broad protections, which does not leave room for Petitioner's impressionistic method of statutory interpretation. *See also infra* 16–17.

Petitioner also raises concerns that Congress's choice not to exempt service advisors will cause "division" among dealerships' employees and will "not advance the core policy goals of the FLSA." Pet. Br. 33–34. These arguments are wrong on the merits, but the bigger problem is that Petitioner is directing them to the wrong institution. When interpreting a statute, the Court's "appraisal of the wisdom or unwisdom of a particular course consciously selected by the Congress is to be put aside." *TVA* v. *Hill*, 437 U.S. 153, 194 (1978).

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[4] Petitioner claims this approach renders Section 13(b)(10)(A)'s reference to partsmen superfluous because (Petitioner says) partsmen also do not service automobiles. Pet. Br. 40–41. The Ninth Circuit explained that this is not true, Pet. App. 13–15, but even if it were true, it would not matter. A "partsman" is exempt only to the extent that he is "primarily engaged in . . . servicing automobiles." 29 U.S.C. § 213(b)(10)(A). Some partsmen may service automobiles and be exempt, while others may not. That does not render the statute's inclusion of partsmen superfluous. *See Buehlman* v. *Ide Pontiac, Inc.*, No. 6:15-cv-6745(MAT), 2016 WL 6581757, at *3–4 (W.D.N.Y. Nov. 7, 2016) (holding that partsmen who do not service automobiles are not exempt and rejecting argument that this renders the partsman exemption superfluous).

If Petitioner believes Section 13(b)(10)(A) needs revision, "there's a constitutionally prescribed way to do it. It's called legislation." *Perry* v. *Merit Sys. Prot. Bd.*, 137 S. Ct. 1975, 1990 (2017) (Gorsuch, J., dissenting). Congress, through and with the HELP Committee, is the appropriate body to assess Petitioner's policy concerns. The Court's task is to honor Congress's judgments by enforcing the text it enacted. *See Citicorp Indus. Credit, Inc.* v. *Brock*, 483 U.S. 27, 34 (1987) (refusing to expand FLSA exemptions based on policy); *Addison* v. *Holly Hill Fruit Prods.*, 322 U.S. 607, 618–20 (1944) (same). That text does not exempt service advisors.

II. Section 13(b)(10)(A)'s History Confirms That Congress Intentionally Drafted The Exemption Narrowly To Exclude Service Advisors.

1. Congress's omission of service advisors from Section 13(b)(10)(A) was no accident. Today's exemption is the result of a lengthy process in which Congress carefully narrowed a broader exemption for all automobile dealership employees. Congress considered the responsibilities of various dealership employees and—consistent with the contemporary public meaning of the occupational terms—understood that the job of service advisor was distinct from that of salesman, partsman, and mechanic. Congress then wrote an exemption that covered salesmen, partsmen, and mechanics, but not service advisors.

Section 13(b)(10)(A) began its life in the 1966 amendments to the FLSA. Fair Labor Standards Amendments of 1966, Pub. L. No. 89-601 § 209(b), 80 Stat. 830, 836 (codified at 29 U.S.C. § 213(b)(10) (1970)). Before 1966, the FLSA contained a blanket exemption from its minimum-wage *and* overtime provisions for "any employee of a retail or service establishment which is primarily engaged in the business of selling automobiles, trucks, or farm implements." Fair Labor Standard Amendments of 1961, Pub. L. No. 87-30 § 9, 75 Stat. 65, 71 (codified at 29 U.S.C. § 213(a)(19) (1964)).

The 1966 amendment narrowed that exemption in two respects. First, it limited the exemption to the FLSA's overtime provisions. 29 U.S.C. § 213(b)(10) (1970). Second, it reduced the scope of the exemption from "any employee" to "any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles, trailers, trucks, farm implements, or aircraft." *Id.*

Congress further tailored the exemption in 1974. Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259 § 14, 88 Stat. 55, 65. It removed the exemption for trailer and aircraft partsmen and mechanics, creating a new exemption for just "salesm[e]n primarily engaged in selling trailers, boats, or aircraft." 29 U.S.C. § 213(b)(10)(B). It also enacted Section 13(b)(10)(A) in its current form.

Congress paid close attention to the nature of the occupations it exempted from the FLSA's overtime protections. Legislators discussed the distinct responsibilities of automobile salesmen, partsmen, and mechanics.[5] They were also aware of service advisors' responsibilities, which differed from those of salesmen, partsmen, and mechanics as legislators understood them.[6] These discussions show that Congress understood service advisors to be distinct from salesmen, partsmen, and mechanics—the "three occupations" covered by the exemption. 112 Cong. Rec. 20,502.

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[5] *See* 112 Cong. Rec. 20,502 (1966) (Sen. Bayh) ("The partsman classifies, shelves and dispenses parts used by mechanics"); *id.* at 20,503 (Sen. Hruska) ("[Y]ou can buy a new tractor from a salesman[.]"); *id.* at 20,504 (Sen. Yarborough) ("[T]he salesman . . . can go out and sell an Oldsmobile, a Pontiac, or a Buick all day long and all night."); *id.* (Sen. Bayh) (partsmen "come down

2. Congress's understanding that service advisors were distinct from salesmen, partsmen, and mechanics reflected the definitions of the relevant occupations in the 1966–1967 and 1974–1975 editions of the Department of Labor's Occupational Outlook Handbook (OOH).

Congress established the Occupational Outlook Service within the Bureau of Labor Statistics (BLS) in 1940, in response to a Presidential Advisory Committee's recommendation that BLS "make long-range studies of . . . occupational outlook." Harold Goldstein, *The Early History of the Occupational Outlook Handbook*, Monthly Labor Rev., May 1999, at 3, *available at* https://goo.gl/jdYrC6. BLS published the first OOH in 1949. U.S. Dep't of Labor, OOH, Bulletin No. 940 (1949 ed.). Since then, "every informed person in the field of vocational guidance has come to regard it as one of his indispensable tools." U.S. Dep't of Labor, OOH, Bulletin No. 998, at II (1951 ed.).

Courts, Congress, and federal agencies also rely on the OOH. Courts have recognized that the OOH is instructive in determining the common understanding

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to the store to show [the mechanic] which part should be used"); *id.* (Sen. Yarborough) (mechanics "repair . . . cars and tractors").

[6] *Fair Labor Standards Amendments of 1971: Hearings Before the Subcomm. on Labor of the Comm. on Labor and Pub. Welfare*, 92d Cong. 780–81 (1971) (service advisors "wait[] on the customer," "tell you what that repair job is going to cost on your automobile before the job is actually performed," and "contact the customer before any further work is done on the automobile").

of occupational terms in the FLSA. *E.g.*, *Belt* v. *Em-Care, Inc.*, 444 F.3d 403, 406, 416 (5th Cir. 2006); *Clark* v. *United Emergency Animal Clinic, Inc.*, 390 F.3d 1124, 1127 (9th Cir. 2004); *Johnson* v. *Wave Comm GR LLC*, 4 F. Supp. 3d 423, 439 (N.D.N.Y. 2014). Congress has cited the OOH as a "very important and widely used" source for up-to-date information about jobs in the United States. H.R. Rep. No. 81-1797, at 91 (1951); *see* 96 Cong. Rec. 1912 (1950) (citing the OOH); 119 Cong. Rec. 21,261 (1973) (same); 124 Cong. Rec. 21,060, 27,797 (1978) (same). And numerous agencies rely on the OOH in administrative decisions, including some contemporaneous with the 1966 and 1974 FLSA amendments. *E.g.*, *In re VSP-F-II, LLC*, 2017 WL 5654954, at *3 n.3 (DHS Admin. App. Office Oct. 31, 2017) (deeming the OOH an "authoritative source[] on the duties of the wide variety of occupations that [it] address[es]").[7]

In 1966 and 1974, the OOH gave separate definitions for automobile salesmen, partsmen (or "parts countermen"), mechanics, and service advisors. These common-sense definitions accord with Respondents' interpretation of Section 13(b)(10)(A). Automobile salesmen, according to the OOH, sell automobiles.

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[7] *See In re Panganiban*, 13 I. & N. Dec. 581, 582–83 (B.I.A. 1970) (relying on the OOH); *In re Springfield Electrotype Serv., Inc.*, 166 N.L.R.B. 639, 642 n.16 (1967) (same); *In re Stamatiades*, 11 I. & N. Dec. 643, 644–45 (B.I.A. 1966) (same); *accord In re Womack*, Nos. 2013-LHC-01205 et al., 2014 WL 6482197, at *20 (Dep't of Labor Ben. Rev. Bd. June 30, 2014); *Higginbotham* v. *Army*, No. SF-0752-12-0769-I-1, 2012 WL 8203340 (MSPB Dec. 11, 2012); *In re D.S.*, No. 07-934, 2007 WL 2848801, at *3 (Empl. Comp. App. Bd. Aug. 17, 2007); [*Title Redacted by Agency*], Bd. Vet. App. 9318727, 1993 WL 13604663, at *9 (Jan. 1, 1993); IRS Chief Counsel Advisory 201349013, 2013 WL 6355756 (Dec. 6, 2013).

U.S. Dep't of Labor, OOH, Bulletin No. 1450, at 309–10 (1966–67 ed.) [hereinafter 1966 OOH]; U.S. Dep't of Labor, OOH, Bulletin No. 1785, at 220–21 (1974–75 ed.) [hereinafter 1974 OOH]. Partsmen identify, sell, and repair the parts needed for automobile repairs. 1966 OOH at 312–13; 1974 OOH at 219–20. Mechanics do "preventative maintenance, diagnose breakdowns, and make repairs." 1966 OOH at 477–78; 1974 OOH at 417–18. Service advisors figure out what services a customer needs, calculate their cost, send the order to the mechanic, and deal with customer complaints. 1966 OOH at 314–15; 1974 OOH at 222–23.

The OOH's definitions reveal that the public understood in 1966 and 1974 (as today) that "service advisor" is a different occupation than "salesman," "partsman," or "mechanic." Importantly, the definitions align with legislators' understanding of the four occupations' distinct responsibilities. *Supra* n.5; *see also Encino*, 136 S. Ct. at 2121–22 (similar definition). That shows that Congress intended the terms "salesman," "partsman," and "mechanic" in Section 13(b)(10)(A) to carry the common meanings reflected in the OOH, which do not encompass the separate—and separately defined—occupation of service advisor. And it confirms that if Congress had meant to exempt service advisors, Congress would have done so by naming them directly.

3. Section 13(b)(10)(A)'s purposes explain why Congress chose to exempt salesmen, partsmen, and mechanics, but not service advisors. When Congress enacted the blanket exemption for dealership employees in 1961, it did so based on its judgment that dealership employees work irregular hours, making overtime too hard to calculate. *See* 106 Cong. Rec. 15,195 (1960) (Rep. Dent) ("[I]f a man happens to be in a type of employment where his hours are uncontrollable, so

far as his earnings are concerned, he should not be put . . . under a maximum hours law."); *id.* at 16,693 (Sen. Keating) ("[T]he difficulty . . . has been that they work odd hours in order to get their work done.").

After 1961, Congress realized the blanket exemption was overbroad, and it sought to identify only those employees who actually worked irregular hours or worked off of dealership grounds. In committee, legislators considered facts about various occupations to decide which had the necessary "vicissitudes and . . . uncertainties" to justify the exemption. 112 Cong. Rec. 20,506 (Sen. Javits).

Legislators ultimately decided that automobile salesmen, mechanics, and partsmen qualified. Salesmen and mechanics "work . . . outside" and have "difficulty . . . keeping regular hours. *Id.* at 20,504 (Sen. Yarborough). Salesmen "go out at unusual hours," *id.* (Sen. Bayh), while mechanics "go[] out and answer[] calls in the rural areas," *id.* (Sen. Yarborough). Therefore, "[i]t is difficult to keep their time records." *Id.* at 20,505 (Sen. Clark). Similarly, partsmen worked "on an irregular schedule" for "longer hours or at other than regular times." *Id.* at 20,502 (Sen. Bayh). As with salesmen and mechanics, "it would not be easy to place partsmen on a time-clock basis and to compute overtime compensation in an equitable manner." *Id.*

Legislators contrasted automobile salesmen, partsmen, and mechanics with other employees who work inside during regular hours, such as "retail clerks," "secretaries," and "clerical workers." *Id.* at 20,504 (Sen. Yarborough). Those employees, legislators thought, should receive overtime pay. *Id.* And, in the ways that matter, service advisors are much more like those nonexempt employees than they are like automobile salesmen, partsmen, or mechanics. Service advisors work regular hours and interact with customers at the dealership rather than traveling off-site. 1966 OOH at 314, 316; 1974 OOH at 222–24. It is simple for employers to calculate the overtime they owe service advisors, even when such employees are paid commissions. Law Profs. Br. 14–17. Exempting service advisors, therefore, would not advance Section 13(b)(10)(A)'s purposes, even though these employees (like other non-exempt clerical staff) further the dealership's commercial mission of selling and servicing automobiles.

4. Denying the plain import of Section 13(b)(10)(A)'s history, Petitioner hypothesizes several alternative purposes for the exemption. Besides being ahistorical, those hypotheses misunderstand the FLSA's design. For example, Petitioner argues that service advisors should be exempt because they are paid commissions. Pet. Br. 32–33. But Congress did not think the mere fact that some automobile salesmen, partsmen, and mechanics receive commissions was enough to justify the exemption. To the extent legislators referred to those employees' commissions, it was only to explain that commission pay caused them to work irregular hours. *See* 112 Cong. Rec. 11,289 (Rep. Andrews) ("It is impossible to successfully work these employees on a schedule basis because their ability to earn commissions depends on their availability when sales can be made or repairs are needed."). That is not true of service advisors.

And, in fact, the FLSA does not exempt all employees who earn commissions. Law Profs. Br. 12–14. It exempts such employees only if they earn 1.5 times the minimum wage and earn more than half of their compensation from commissions. 29 U.S.C. § 207(i). To exempt all service advisors based on their commissions, even if they do not satisfy Section 207(i), would upset Congress's decision to exempt only some commissioned employees.

Petitioner also argues that service advisors should be exempt because they are paid well, Pet. Br. 34, but nothing in Section 13(b)(10)(A) turns on an employee's compensation, Law Profs. Br. 8–10. If Congress had wanted to restrict overtime protections to only those dealership employees who earn less than a certain amount, Congress would have—and easily could have—done so explicitly when it narrowed the exemption in 1966. Congress simply chose not to do so.

5. The process by which Congress enacted Section 13(b)(10)(A)—progressively narrowing a broader exemption to cover only a small number of carefully selected occupations—tracks its general approach to the FLSA. Congress passed the FLSA to create broad wage and hour protections for American workers. *Powell*, 339 U.S. at 516; *Darby*, 312 U.S. at 109. Since then, it has continually expanded the FLSA's protections. The 1966 amendments, for example, extended the FLSA's coverage to "over eight million additional employees." Robert N. Willis, *The Evolution of the Fair Labor Standards Act*, 26 U. Miami L. Rev. 607, 625 (1972). Subsequent amendments broadened its scope even further. *E.g.*, Fair Labor Standards Amendments of 1974 §§ 4, 6–8, 88 Stat. at 56–62.

At the same time, Congress has carefully tailored the FLSA's exemptions to cover only "narrow and specific" categories of employees. *Powell*, 339 U.S. at 517. All employees are protected unless they are "expressly exempted." *Brooklyn Sav. Bank* v. *O'Neil*, 324 U.S. 697, 710 (1945). It is this fact, as well as the remedial purpose of the statute, that justifies the Court's longstanding practice of interpreting FLSA exemptions no more broadly than their text requires. Contrary to Petitioner's contention, this practice reflects the Court's duty to interpret exemptions "fairly and correctly," Pet. Br. 50, and pays "due regard" to the FLSA exemptions' text and history by reading the exemptions as the narrow carve-outs Congress intended them to be, *A.H. Phillips, Inc.* v. *Walling*, 324 U.S. 490, 493 (1945). As the Court has explained, the "detail" and "particularity" of FLSA exemptions "preclude their enlargement by implication." *Addison*, 322 U.S. at 617; *Citicorp. Indus. Credit*, 483 U.S. at 35 (quoting *Addison*).

* * * *

The FLSA's text and history reveal that the "statutory plan," *Dep't of Revenue* v. *ACF Indus., Inc.*, 510 U.S. 332, 340 (1994), is to protect workers unless they are clearly exempted. Petitioner would disrupt that plan by expanding Section 13(b)(10)(A)'s plain text through tortured textual analysis and appeals to policy. This Court has rejected similar attempts in the past. *Citicorp. Indus. Credit*, 483 U.S. at 34–35; *Addison*, 322 U.S. at 618–20. It should do so again. To honor congressional intent and "the distinctive functions of the legislative and judicial processes," *Addison*, 322 U.S. at 618, the Court should follow Section 13(b)(10)(A)'s text and history where they lead, and hold that service advisors are not exempt from the FLSA's overtime protections.

CONCLUSION

The Court should affirm the judgment of the Court of Appeals.

Respectfully submitted,

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December 15, 2017

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FILED
NOV - 8 2017
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 16-1362

In the
Supreme Court of the United States

ENCINO MOTORCARS, LLC,
Petitioner,
v.
HECTOR NAVARRO, MIKE SHIRINIAN, ANTHONY PINKINS, KEVIN MALONE, REUBEN CASTRO,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF FOR AMICI CURIAE NATIONAL AUTOMOBILE DEALERS ASSOCIATION AND STATE AUTOMOBILE DEALERS ASSOCIATIONS FOR ALASKA, ARIZONA, CALIFORNIA, HAWAII, IDAHO, MONTANA, NEVADA, OREGON AND WASHINGTON STATE IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether "service advisors" at automobile and truck dealerships are exempt from the overtime pay requirements of the Fair Labor Standards Act under 29 U.S.C. § 213(b)(10)(A), which provides an exemption for "any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles [or] trucks."

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IDENTITY AND INTEREST OF AMICI CURIAE

The National Automobile Dealers Association (NADA), and nine state motor vehicle dealers associations for states in the Ninth Circuit (the "State Dealers Associations"), respectfully submit this brief amicus curiae in support of Petitioner Encino Motorcars, LLC.[1] Amicus curiae are 501(c)(6) non-profit trade associations representing franchised automobile and truck dealerships nationally and in each of the states comprising the Ninth Circuit, whose members are significantly impacted by the Ninth Circuit's decision, and as such, have a keen interest in the issues presented.

National Automobile Dealers Association

NADA is a national non-profit trade organization, incorporated in the State of Delaware. Founded in 1917, NADA serves and represents franchised new motor vehicle[2] dealers nationwide. Its members sell new motor vehicles and related goods and services as authorized dealers of various motor vehicle manufacturers and distributors doing business in the United States. There are more than 18,000 franchised motor vehicle dealerships in the United States. Of those, more than 16,000 are members of NADA. As an organization, NADA informs members about relevant legal and regulatory issues and closely monitors federal statutes, state statutes, and court rulings interpreting such laws. NADA appears before and submits briefs to courts and other tribunals as amicus curiae to advocate interpretations of federal and state statutes that will advance the interests of its members as a group.

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[1] Pursuant to this Court's Rule 37.3(a), all parties have consented to the filing of this brief, having filed blanket consents with this Court on October 26, 2017. Pursuant to Rule 37.6, Amici Curiae affirm that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amici curiae, their members, or their counsel made a monetary contribution to its preparation or submission.

[2] Amici's members are comprised of both automobile and truck dealerships, referred to collectively in this brief as "motor vehicle dealerships."

State Dealers Associations

The following State Dealers Associations join as amici in this brief: Alaska Automobile Dealers Association; Arizona Automobile Dealers Association; California New Car Dealers Association; Hawaii Automobile Dealers Association; Idaho Automobile Dealers Association; Montana Automobile Dealers Association; Nevada Franchised Auto Dealers Association; Oregon Automobile Dealers Association; and Washington State Auto Dealers Association. Each is a registered non-profit trade organization, representing new car and truck dealerships in the state. Collectively, the State Dealers Associations represent 90% of the more than 2,700 dealerships in the nine states comprising the Ninth Circuit. Their members are franchised retail sellers of new motor vehicles and related goods and services, serving as authorized dealers for motor vehicle manufacturers and distributors.

Each State Dealers Association provides services to its members on a state-wide basis, similar to those provided by NADA nationally. These services include informing members about relevant legal and regulatory issues and closely monitoring federal statutes, state statutes, and court rulings interpreting such laws. Each of the State Dealers Associations appears before and submits briefs to courts and other tribunals as amicus curiae to advocate interpretations of federal and state statutes that will advance the interests of its members as a group.

This case raises issues of immense practical significance to amici and their dealership members. The Ninth Circuit's decision, if allowed to stand, will have an adverse impact on all franchised motor vehicle dealers nationally, as it forecloses the availability of an overtime exemption on which dealerships and their employees have relied in structuring their compensation plans for more than 40 years.

INTRODUCTION AND SUMMARY OF ARGUMENT

For more than 40 years, the nation's motor vehicle dealerships have relied on the overtime exemption in section 13(b)(10) of the Fair Labor Standards Act (FLSA) for "any salesman . . . primarily engaged in selling or servicing automobiles or trucks" in classifying and compensating their Service Advisors.[3] The exemption has allowed dealerships to compensate Service Advisors – who are engaged in the sale of service solutions to dealership customers – based substantially on their sales productivity rather than on the number of hours they work. These compensation arrangements benefit both dealerships and employees, and Service Advisors are generally well paid for their contributions to dealership revenues.

Dealerships have relied not only on the statutory language of the exemption, but as important, on a solid wall of judicial authority interpreting its scope. Until the Ninth Circuit's decisions in this case, every federal and state court, including several circuit courts of appeals, held that that the statutory exemption encompasses Service Advisors.

The Ninth Circuit's most recent decision rejecting the applicability of the exemption to these well compensated employees is an outlier that disregards an unbroken line of decisional law to the contrary. An affirmance of this startling decision would disrupt what was previously a settled, widely accepted compensation practice in the nation's franchised motor vehicle dealerships.

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[3] We use the generic title "Service Advisor," but the position is also known as Service Writer or Service Salesman, among other titles.

The impact of the Ninth Circuit's decision cannot be overstated. Every franchised dealership across the country operates a service department that employs Service Advisors.[4] Franchised automobile and truck dealerships (*i.e.*, motor vehicle dealerships) nationwide together employ more than 100,000 Service Advisors,[5] who are universally classified as overtime-exempt, typically under section 13(b)(10). The Ninth Circuit's decision invalidates the longstanding practice of classifying Service Advisors under this statutory exemption. An affirmance would result in unanticipated liability for past pay practices and windfalls to these well compensated sales employees. Excluding Service Advisors from exempt status would cause disruption and upheaval to dealerships and employees alike, because it would force dealerships to restructure Service Advisors' compensation to avoid that liability going forward.

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[4] On average, light-duty automobile dealerships employ an estimated 5.7 Service Advisors each. National Automobile Dealers Assn., *NADA Data 2016: Annual Financial Profile of America's Franchised New-Car Dealerships* (2016) ("*2016 NADA Data*"). Commercial truck dealerships employ an estimated 3.5 Service Advisors each. National Automobile Dealers Assn., *ATD Data 2016: Annual Financial Profile of America's Franchised New-Truck Dealerships* ("*2016 ATD Data*").

[5] In amicus briefs filed by amici the last time this case came before this Court, NADA estimated that 45,000 Service Advisors were employed in dealerships nationwide. Based on a new review by expert data analysts and data collected for the *2016 NADA Data* and *2016 ATD Data* reports, cited above, NADA has concluded that is previous estimate significantly understated the actual number of Service Advisors employed nationally.

Amici urge the Court to reverse the decision of the Ninth Circuit and make clear that this key exemption remains in force as it has for the last 40 years.

ARGUMENT

I. Service Advisors Are Key Contributors to the Revenues of Franchised Motor Vehicle Dealerships, and Have Been Classified as Exempt Sales Employees for Four Decades.

There are more than 18,000 franchised motor vehicle dealerships in the United States, the great majority of which are represented by amici. Nationally, franchised dealerships together employ an estimated 1.2 million people and have an estimated annual payroll of nearly $70 billion.[6] At the same time, the overwhelming majority are small businesses as defined by the Small Business Administration.

Every franchised motor vehicle dealership in the country has a service department. Service departments provide expert vehicle maintenance and repair services to dealership customers, and are a key revenue and profit center for dealerships. No position is more crucial to the vehicle service function than the Service Advisor. Service Advisors evaluate customers' service and repair needs, help diagnose mechanical problems, advise customers about services to address specific problems, provide information about optional and supplemental services, work intimately with dealership mechanics, and ensure the customer is satisfied with the service received. In short, Service Advisors are engaged in selling service, maintenance and repairs through the customer relationships they cultivate on a day-to-day basis. They are quite simply indispensable to the servicing of automobiles and trucks at dealerships.

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[6] *2016 NADA Data* at 33, 35; *2016 ATD Data* at 6, 16.

NADA estimates that 100,000 Service Advisors are employed in franchised dealerships across the United States. According to compensation data compiled by NADA, Service Advisors are well compensated. In 2015 the average annual compensation for Service Advisors employed in automobile dealerships nationwide was $64,635, with the top 10% earning on average more than $97,335 per year.[7] Compensation levels are higher at automobile dealerships in the Ninth Circuit states (Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon and Washington), where the annual average is $68,995, and the top 10% earn on average $103,560 per year.[8]

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[7] National Automobile Dealers Assn., *2016 Dealership Workforce Study: Automotive Retail National & Regional Trends in Compensation, Benefits & Retention* (NADA 2016) (hereafter "*NADA 2016 Workforce Study*") at 11. The top 10% compensation figure is based on NADA's unpublished analysis of 2015 data collected for the *2016 Workforce Study*.

Service Advisors are universally classified as exempt from overtime, typically under section 13(b)(10) of the FLSA, which exempts "salesmen . . . primarily engaged in selling or servicing automobiles or trucks."[9] The 13(b)(10) exemption requires nothing other than that such an employee be engaged in the selling or servicing process at the dealership. It thus provides flexibility in terms of compensation structure and level, including arrangements that involve a generous and predictable base wage combined with the option for incentive pay as an upside to sales productivity.

II. For More Than 40 Years, Motor Vehicle Dealerships Have Relied on Authoritative Interpretations of the Section 13(b)(10) Exemption in Classifying and Compensating Their Service Advisors.

Because of the importance of the 13(b)(10) exemption to franchised dealerships, in the 40-plus years since the exemption was enacted, amici have closely tracked judicial and agency interpretations addressing its meaning and scope. Until the Ninth Circuit's 2015 and 2017 decisions in this case, federal and state courts had uniformly interpreted the exemption to encompass Service Advisors. Looking to the language of the statutory exemption itself, these courts uniformly rejected DOL's 1970 interpretive guidance that Service Advisors did not fall within the section 13(b)(10) exemption. For some 40 years, the DOL acquiesced in these judicial decisions. And based on that consistent, authoritative interpretation, for the last 40 years amici have advised their members that Service Advisors qualify for the section 13(b)(1) exemption and need not be paid overtime. Amici's member dealerships have entered into countless compensation arrangements with their Service Advisors based on this settled understanding of the law.

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[8] Unpublished NADA analysis of 2015 data collected for *2016 Workforce Study*.

[9] 29 U.S.C. § 213(b)(10).

The section 13(b)(10) exemption was originally enacted in 1966.[10] In 1970, the DOL promulgated interpretive regulations that ignored the literal language of the statute and narrowed the exemption by defining "salesman" as "an employee who is employed for the purposes of and is primarily engaged in making sales or obtaining orders or contracts for sale of [vehicles]."[11] Indeed, the regulation went on to explicitly *exclude* Service Advisors from the exemption, although recognizing that their principle functions included "diagnosing the mechanical problems of vehicles brought in for repair, . . . and directing and checking on the work of mechanics."[12]

In the litigation that inevitably followed, the DOL's 1970 interpretive guidance was soundly and consistently rejected by the courts. Beginning with the 1973 decision of the Fifth Circuit in *Brennan v. Deel Motors, Inc.*,[13] and up until the Ninth Circuit's 2015 decision in this case, the decisions of federal circuit courts,[14] federal district courts,[15] and state courts[16] uniformly held that Service Advisors are covered by the exemption.

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[10] Pub. L. No. 89-601, 80 Stat. 830 (1966).

[11] 29 C.F.R. § 779.372(c)(1) (1971).

[12] *Id.* § 779.372(c)(4).

In the face of consistent judicial rejection of its 1970 interpretive regulation, the DOL acquiesced to the courts' interpretation. In 1978 it rescinded its regulatory guidance, issuing an Administrator Opinion squarely declaring that "service writers, service advisors, service managers, or service salesmen" qualify as "salesmen" for purposes of the exemption, and are generally exempt.[17] In 1987, the DOL revised its enforcement bible, the Wage & Hour

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[13] 475 F.2d 1095 (5th Cir. 1973).

[14] *Deel Motors,* 475 F.2d 1095; *Walton v. Greenbrier Ford, Inc.*, 370 F.3d, 446 (4th Cir. 2004); *see Bonner v. City of Prichard,* 661 F.2d 1206 (11th Cir. 1981) (adopting 5th Circuit decisions prior to 9/30/81 as controlling precedent).

[15] *Clark & Day v. Palmen Motors,* No. 98-C-0548 (E.D. Wisc. 1988); *Dayton v. Coral Oldsmobile, Inc.*, 684 F. Supp. 290 (S.D. Fla. 1988); *Yenney v. Cass County Motors,* No. 76-0-294, 1977 WL 1678 (D. Neb. Feb. 8, 1977); *Brennan v. Import Volkswagen, Inc.*, No. W-4982, 1975 WL 1248 (D. Kan. Oct. 21, 1975); *Brennan v. North Bros. Ford, Inc.*, No. 40344, 1975 WL 1074 (E.D. Mich. Apr. 17, 1975), *aff'd sub nom., Dunlop v. North Bros. Ford, Inc.* , 529 F.2d 524 (6th Cir. 1976) (unpublished table decision).

[16] *Thompson v. J.C. Billion, Inc.*, 368 Mont. 299 (Mont+. 2013).

[17] U.S. Dep't of Labor, Wage & Hour Op. Ltr. WH-467, 1978 WL 51403 (July 28, 1978).

Field Operations Handbook (FOH), to reflect that opinion and to incorporate the judicial authority on which it was based.[18] The FOH noted the DOL's intention to revise its regulations at 29 C.F.R. section 779.372 "as soon as is practicable" to reflect the judicial interpretation of the exemption.

Nearly 20 years later, in 2008, the DOL issued proposed regulations to formally codify the judicial interpretations of the section 13(b)(10) exemption as encompassing Service Advisors and confirming the agency's acquiescence to these interpretations over the previous three decades.[19] In 2011, however, the DOL abruptly reversed course, issuing a Final Rule that reneged on its long-held position and 2008 proposal and revived its judicially-rejected 1970 position that the exemption covers only those dealership salesmen who sell vehicles.[20]

Litigation was inevitable and not long in coming. In 2012, the year after the Final Rule was promulgated, the plaintiff Service Advisors in this case filed their challenge to their classification under the section 13(b)(1) exemption. The District Court refused to defer to the DOL's new position, rejecting it as inconsistent with the statutory language and Congressional intent.[21] The Ninth Circuit reversed, deferring to the agency's 2011 interpretation.[22] This Court granted certiorari, and in a 2016 opinion vacated the Ninth Circuit's decision because it erred in placing controlling weight on the DOL's 2011 Final Rule. No deference was owed to the DOL's new interpretation, this Court held, in part because in adopting it, the DOL had disregarded "decades of industry reliance on the Department's prior policy" in "negotiat[ing] and structur[ing] their compensation plans."[23]

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[18] U. S. Dep't of Labor, Wage & Hour Div., *Field Ops. Handbook* § 24L04(k) (October 20, 1987).

[19] 73 Fed. Reg. 49621, 43659, 43671 (July 28, 2008).

[20] *See* Updating Regulations Issued under the FLSA, 76 Fed. Reg. 18832, 18859 (Apr. 5, 2011).

[21] Appendix to Petition for Certiorari ("Pet.App.") at 83.

On remand, however, the Ninth Circuit affirmed its original opinion that Service Advisors are not encompassed within the section 13(b)(10) exemption, all the while avoiding reference to the DOL's 2011 interpretive regulation. The Ninth admitted that a literal reading of the statute would encompass Service Advisors, but it rejected such a reading as inconsistent with Congressional intent. As before, it held that Service Advisors do not fall within the exemption because they do not personally perform servicing functions.[24] Nowhere did the court mention, much less consider, the reliance interests of an entire industry on 40 years of consistent judicial and agency authority, despite this Court's extensive discussion of reliance interests in its previous opinion in this case. Instead, the Ninth Circuit simply stated that it disagreed with the decisions of its sister circuits "for the reasons stated in our earlier opinion (except those reasons concerning deference to the agency)."[25]

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[22] Pet.App. at 55-73.

[23] Pet.App. at 42.

[24] Pet.App. at 13-15.

The Ninth Circuit's most recent decision ignores the reliance interests that animated this Court's 2016 decision, and has upended settled industry practice among the more than 18,000 motor vehicle dealerships across the country.

III. The Ninth Circuit's Decision Creates Unanticipated Liabilities for the Nation's Motor Vehicle Dealerships and Disrupts Longstanding Compensation Arrangements.

Over the last 40 years, automobile dealerships across the country have classified Service Advisors as overtime-exempt in reliance on authoritative judicial interpretations of the section 13(b)(10) exemption, and have structured their compensation and recordkeeping practices accordingly. A decision by this Court affirming the Ninth Circuit's anomalous rule would upend these longstanding industry practices, creating unanticipated retroactive liability for past practices and widespread disruption for motor vehicle dealerships. The impact of this decision in the real world of brick-and-mortar dealerships cannot be overstated.

Without a reversal by this Court, dealerships that have relied on the section 13(b)(10) exemption in classifying their Service Advisors will face unanticipated liability for past violations, which at the time were not considered violations at all. If the exemption is foreclosed, these dealerships will be subject to private FLSA back pay claims and significant potential liability, given that the national average workweek for Service Advisors is about 45 hours.[26] In addition to unpaid overtime liability for about five hours per week for each Service Advisor going back up to three years, dealerships could face liability for liquidated damages equal to unpaid overtime, interest and attorney's fees.[27] Potential liability across the industry could swiftly approach many hundreds of millions of dollars

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[25] Pet.App. at 30.

This specter is very real. Contrary to Respondents' "no-big-deal" arguments the last time this case was before the Court, the FLSA's section 7(i) exemption for certain commissioned employees will be unavailable to a significant portion of the nation's dealerships with respect to past liability. That exemption has multiple technical requirements concerning type of business, compensation structure and hourly wage average, each of which must be satisfied.[28] Heretofore, dealerships have had no need to consider these requirements in structuring their pay and timekeeping practices due to the simplicity of section 13(b)(10), which has no such technical requirements.

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[26] *NADA 2016 Workforce Study* at 115. These weekly hours are consistent with the hours worked by exempt vehicle salespersons. *Id.*

[27] 29 U.S.C. § 216(b).

[28] The section 7(i) exemption applies only to employees who (i) work in retail or service establishments; (ii) earn more than 1.5 times the minimum wage for all hours worked; and (iii) are paid commissions that comprise more than 50% of total compensation. 29 U.S.C. § 207(i); *see Gieg v. DRR, Inc.*, 407 F.3d 1038, 1044-47 (9th Cir. 2005).

The so-called commissioned sales exemption of section 7(i) of the FLSA, for example, is not available to dealerships whose compensation plans have been structured to provide more generous base compensation in comparison to commissions.[29] And dealerships that have not kept time records for their previously exempt Service Advisors (because there was no reason to do so, given the universal understanding of the law) will have difficulty establishing that employee's average hourly compensation meets the 7(i) requirement of pay exceeding 1.5 times the minimum wage for each and every hour worked.[30] Finally, the section 7(i) exemption is not available to dealerships that do not qualify as "retail establishments" due to their mix of revenue sources, when over 25% of revenues comes from non-retail sales, such wholesale fleet sales and leases.[31]

Furthermore, an affirmance would have a significant disruptive impact on employees themselves, as dealerships would be forced to radically restructure previously agreed-upon compensation arrangements to avoid future liability.

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[29] *See* 29 U.S.C. § 207(i) (exemption requires that commissions make up more than 50% of the employee's compensation).

[30] *Id.*

[31] *See Gieg*, 407 F.3d at 1048-49 (citing *Acme Car & Truck Rentals, Inc. v. Hooper*, 331 F.2d 442, 446-48 (5th Cir. 1964) and 29 C.F.R. § 779.371 (excluding fleet sales and leasing revenues from retail sales revenue calculation).

Many, at least those who qualify as retail establishments, may restructure Service Advisor compensation to allocate a greater proportion to commissions in an attempt to meet the 7(i) exemption, thus placing more wages at risk, a disadvantage to employees in lean economic times. Others will put Service Advisors on an hourly pay plan, paying overtime but lowering or even doing away with commissions, thus eliminating some or all of the upside advantage provided to employees through performance-based commission systems. There is nothing more disruptive to an employee than changing her compensation plan, even when the result is that her net income is roughly equivalent or even greater.

Affirming the Ninth Circuit's decision also threatens to upend settled industry practice with respect to partsmen in dealerships. As demonstrated in Petitioner's Brief, the Ninth Circuit's crabbed reading of the statutory exemption as encompassing only those who personally sell or service vehicles effectively writes partsmen out of the exemption.[32] Indeed, partsmen's duties are clearly defined in the regulations as requisitioning, stocking, and dispensing parts,[33] duties that have nothing to do with personally servicing vehicles. Yet partsmen, like Service Advisors, are key members of the service team, historically classified as exempt under the section 13(b)(10) exemption. Citing the Ninth Circuit's rationale, however, a number of district courts have recently held that partsmen do not qualify for the exemption because they are not personally engaged in vehicle servicing functions.[34] The Ninth Circuit's error in this case – its rational for deeming Service Advisors non-exempt – and its disruptive impact on an entire industry – is thus being compounded in unanticipated ways that this Court can and should correct.

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[32] Pet'r. Br. at 40-43.

[33] 29 C.F.R. 779.372(c)(2).

In sum, affirming the Ninth Circuit's anomalous decision would lead to significant unanticipated liability for dealerships that have justifiably relied on the section 13(b)(10) exemption in the past in classifying Service Advisors and other key members of their service teams. The disruption will extend to Service Advisors themselves going forward, who will find their compensation plans changed in ways that may not ultimately benefit them.

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[34] *Buehlman v. Ide Pontiac, Inc.*, No. 6:15-cv-06745(MAT), 2016 U.S. Dist. LEXIS 154054 (W.D.N.Y. Nov. 7, 2016) (partsmen who do not actually work on automobiles are not exempt); *Bowers v. Fred Haas Toyota World*, No. 4:17-CV-00183 (S.D. Tex. June 22, 2017) (relying on decision below to find that partsmen who do not personally perform repairs and maintenance are not exempt); *see also McBeth v. Gabrielli Truck Sales, Ltd.*, 768 F. Supp. 2d 383, 388 (E.D.N.Y. 2010) (interpreting 29 CFR § 779.372 as requiring partsmen to personally service vehicles to qualify for the exemption).

CONCLUSION

The nation's motor vehicle dealerships have relied on more than four decades of settled law in structuring their compensation arrangements with Service Advisors. These arrangements reward sales production, not hours worked. An affirmance would upend historically settled law and result in unanticipated liability to dealerships and severe disruption to Service Advisors.

Amici curiae respectfully request that this Court reverse the judgment of the Ninth Circuit.

Respectfully submitted,

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No. 16-1362

In The
Supreme Court of the United States

◆

ENCINO MOTORCARS, LLC,

Petitioner,

v.

HECTOR NAVARRO, MIKE SHIRINIAN, ANTHONY PINKINS, KEVIN MALONE, AND REUBEN CASTRO,

Respondents.

◆

On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

◆

BRIEF OF NATIONAL EMPLOYMENT LAWYERS ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICUS CURIAE*[1]

The National Employment Lawyers Association ("NELA") is the largest professional membership organization in the country comprising lawyers who represent workers in labor, employment and civil rights disputes. Founded in 1985, NELA advances employee rights and serves lawyers who advocate for equality and justice in the American workplace. NELA and its 69 circuit, state, and local affiliates have a membership of over 4,000 attorneys who are committed to working on behalf of those who have been illegally treated in the workplace. NELA's members litigate daily in every circuit, affording NELA a unique perspective on how the principles announced by the courts in employment cases actually play out on the ground. NELA strives to protect the rights of its members' clients, and regularly supports precedent-setting litigation affecting the rights of individuals in the workplace.

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[1] Pursuant to Rule 37.3(a), counsel for both parties submitted letters to the Clerk granting blanket consent to the filing of *amicus curiae* briefs. Pursuant to Rule 37.6, *amicus* states that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than *amicus*, its members, or its counsel made a monetary contribution intended to fund the preparation or submission of this brief.

NELA has an abiding interest in the protection of the legal rights of working men and women. Service advisors employed at automobile dealerships do not fall within the Section 213(b)(10)(A) exemption of the Fair Labor Standards Act (FLSA). Accordingly, those advisors are entitled to the protections of the FLSA. NELA submits this brief to explain why the decision of the Ninth Circuit Court of Appeals should be affirmed.

◆

SUMMARY OF THE ARGUMENT

Fair Labor Standards Act (FLSA), Section 213(b)(10)(A), only exempts from overtime pay "any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles, trucks, or farm implements . . .." By a plain reading of that section service advisors are not exempt from overtime. The court of appeals accordingly held that the "the most natural reading" of the exemption excludes service advisors, and that holding should be affirmed.

Petitioner's contrary assertion that service advisors are salesmen that service cars is a decidedly forced reading of the Section 213(b)(10)(A). As the court of appeals determined, service advisors may be salesmen "of a sort," but they are not "servicing" automobiles. As Petitioner itself admits, service advisors are not actually servicing cars: they are *selling servicing.*

The exclusion of service advisors from the exemption is further supported by the statutory interpretive rules of *expressio unius est exclusio alterius* and *reddendo singula singulis*, and on these additional grounds the Court can affirm the judgment of the court of appeals.

Finally, though its application is not necessary to affirm the judgment of the court of appeals, this Court's well-settled, consistently-applied rule of construing exemptions to the FLSA narrowly against the employer, in order to achieve the remedial, humanitarian purposes for which the FLSA was enacted, also supports affirming the judgment of the court of appeals.

ARGUMENT

I. THE "MOST NATURAL READING" OF THE SECTION 213(b)(10)(A) EXEMPTION EXCLUDES SERVICE ADVISORS

Statutory construction begins, and absent a clearly expressed legislative intent to the contrary, ends, with the plain language of the statute. *Bread Political Action Comm. v. FEC*, 455 U.S. 577, 580 (1982). A term otherwise undefined in a statute is given its ordinary meaning. *Taniguchi v. Kan Pac.*

Saipan, Ltd., 566 U.S. 560, ____, 132 S. Ct. 1997, 2002 (2012).

The Section 213(b) exemption at issue here exempts from overtime pay "any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles, trucks, or farm implements . . .." 29 U.S.C. § 213(b)(10)(A). To be exempt, under any plain reading of the three positions in that Section, one must be engaged primarily in one of two duties: selling automobiles, trucks, or farm implements; or servicing automobiles, trucks, or farm implements.

Service advisors are not selling cars. Assuming for the moment then that a service advisor is a salesman,[2] Petitioner must acknowledge that a service advisor is not "servicing" a car like the partsman or mechanic. When the partsman and mechanic complete their work on a car with faulty brakes, the car is repaired. When the service advisor's work is done, diagnosing that brake work is needed, the car still does not stop. Petitioner concedes that service advisors are not *really* servicing automobiles, but rather "selling services." Pet.'s Br. at 29. Such an activity, says Petitioner, is part of the "service process." *Id.* at 28.

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[2] While the duties of service advisors include sales of service, making them salesman "of a sort," *Navarro v. Encino Motorcars, LLC*, 845 F.3d 925, 931 (9th Cir. 2017), that job has additional duties that are not sales duties. *Id.* at 927. Further, some duties of the service advisor that might be considered sales of service implicate warranty work, and thus may not result in a "sale" to the customer. Therefore, the position of service advisor and that of car salesman are not coextensive.

Although Petitioner expresses astonishment that an individual selling car servicing to customers is neither selling cars nor servicing them, *Id.* at 29, the plain meaning of those terms—selling and servicing—admits to no other plausible interpretation. Petitioner in effect wants to combine those two words to create a new category of duty, and a new exempt employee.

However, as Petitioner affirms, Pet.'s Br. at 3, 27-28, the duties covered by the Section 213(b)(10)(A) exemption are separated by the disjunctive "or," and not, as Petitioner's interpretation demands, a combination of those terms that would read "selling servicing."

For this same reason, a service advisor is *not* "functionally similar" to partsman or mechanic. *Contra Brennan v. Deel Motors, Inc.*, 475 F.2d 1095, 1097 (5th Cir. 1973). It is black letter law in FLSA jurisprudence that exemptions are applied *vel non* by examination of the actual duties of a position, and not the position's title. *See e.g., Mitchell v. Lublin*, 358 U.S. 207, 213 (1959) ("Congress deemed the activities of the individual employees, not those of the employer, the controlling factor in determining the proper application of the Act"). But comparing the tasks of the service advisor and those of the partsman or mechanic does not yield the same set of duties. The combined work of the partsman and mechanic allows a customer to drive away from the dealership in a functioning car. While some duties of the service advisor—such as evaluating a vehicle's problems—may be preparatory to that result, they do not constitute actual repair work. The service advisor is thus not "functionally similar" to the partsman or mechanic.

Petitioner claims, with some persistence, that the court of appeals determined that a service advisor falls within the "literal" terms of the exemption. Pet.'s Brief at 2, 18, 19, 20, 22, 24, 35, 37, 38, 43, 44, 46, 48, 50. That contention, however, over-eggs the pudding. In fact, the closest the court came to such a conclusion was the following statement: "We agree with Defendant that, under an *expansive interpretation* of the *literal category* of a 'salesman . . . primarily engaged in . . . servicing automobiles,' the statute *could* be construed as exempting service advisors." 845 F.3d at 936 (emphasis added).

With said qualifications the court of appeals was as much saying that, even given Petitioner's preferred construction of "servicing automobiles," service advisors would not be exempt, because that interpretation does not give the words of the exemption their ordinary and natural meaning. *Id.* "That a definition is broad enough to encompass one sense of a word does not establish that the word is *ordinarily* understood in that sense." *Taniguchi,* 566 U.S. at ___; 132 S. Ct. at 2003 (emphasis in original) *citing Mallard v. U.S. D. Ct. for S.D. of Iowa,* 490 U.S. 296, 301 (1989) (utilizing the word's "most common meaning" and "ordinary and natural signification").

The court of appeals here determined that excluding service advisors from the reach of the Section 213(b)(10)(A) exemption is "the most natural reading of the statute." *Navarro,* 845 F.3d at 934. That is, reading the plain language of the statute and giving undefined terms their common meaning, Congress did not intend to include service advisors in the exemption.

II. THIS COURT CAN AFFIRM THE COURT OF APPEALS, WITHOUT APPLICATION OF THE "NARROW CONSTRUCTION" RULE, BY APPLYING OTHER CANONS OF CONSTRUCTION THAT PLAINLY EXCLUDE THE "SERVICE ADVISOR" FROM THE SECTION 213(b)(10)(A) EXEMPTION

Petitioner argues that the unambiguous language of Section 213(b)(10)(A) exempts service advisors from the overtime requirements of Section

7. Pet.'s Brief at 25–26. While *amicus* agrees that the language of the exemption is not ambiguous, Petitioner is wrong that the plain language of Section 213(b)(10)(A) includes service advisors.

To reach that conclusion, Petitioner engages in some linguistic sleight-of-hand. Petitioner admits that service advisors "are engaged in the selling of the servicing of automobiles." Pet.'s Brief at 29. Petitioner contends that service advisors are part of the "service process," *Id.* at 28, "dedicated to" the servicing side of the business, *Id.* at 26, and that they are "integral to the servicing process . . .." *Id.* at 42. Ergo, says Petitioner, service advisors are primarily engaged in servicing automobiles. *Id.* at 26.

Even if Petitioner's statements are true, that service advisors sell services, that they are dedicated to the servicing side of the dealership, and that they are integral to the process of servicing cars, service advisors are still not servicing vehicles, but only, as Petitioner admits, ***selling servicing***.

Under traditional methods of statutory construction, it is clear that service advisors are not within the ambit of the Section 213(b)(10)(A) exemption.

A. Under The Interpretive Rule Of *Expressio Unius Est Exclusio Alterius*, The Section 213(b)(10)(A) Exemption Is Limited To Three Positions, Salesman, Partsman And Mechanic, And Two Duties, Selling Automobiles Or Servicing Automobiles, But Does Not Include Either "Service Advisor" Or The Duty Of "Selling Servicing"

The statutory construction rule *expressio unius est exclusio alterius* provides that the express mention of one thing of a type may excludes others of that type. *U.S. v. Vonn*, 535 U.S. 55, 64 (2002).

This Court has cautioned, however, that the expression-exclusion rule will not apply where indications are that passage of statutory language was likely not meant to signal exclusion of others of the type. *Id.* Similarly, the rule will not be applied to an enumerated series characterized as illustrative, rather than exclusive. *Chevron U.S.A. v. Echazabal*, 536 U.S. 73, 80 (2002). It is further inapplicable if the enumerated series does not support, by a telling absence, an inference that the thing omitted was intentionally left out. *Id.* at 81.

> As we have held repeatedly, the canon expressio unius est exclusio alterius does not apply to every statutory listing or grouping; it has force only when the items expressed are

> members of an "associated group or series," justifying the inference that items not mentioned were excluded by deliberate choice, not inadvertence.

Barnhart v. Peabody Coal Co., 537 U.S. 149, 168 (2003).

Section 213(b)(10)(A) identifies three positions within a car dealership: salesman, partsman, or mechanic. The Section identifies two functions or duties: selling or servicing automobiles. Both groups are "associated group[s] or series," such that the absence of another in the series, such as "service advisor," or "selling servicing," suggests that the omission was an intentional decision on the part of Congress. In this light, the fact that a service advisor is "integral" to the "service process," as Petitioner often notes, is reason to believe that Congress's choice in omitting the service advisor from the exemption was a deliberate choice.

Moreover, Congress's backtracking on the Act's total exclusion of dealership employees in 1961 lends additional credence to the view that its decision-making regarding the particulars of the 1966 amendment was deliberate. As the court of appeals noted in its first decision, the 1961 amendment exempted from the Act *all* employees of car, truck or farm implement dealerships. *Navarro v. Encino Motorcars, LLC*, 780 F.3d 1267, 1276 (9th Cir. 2015).

In the next few years, several bills regarding dealership employees were considered, including one that would have exempted only salesmen and mechanics. *Id.* Those failed. After a number of false starts in 1966, including three "final" versions, the present[3] incarnation of the exemption was passed.

Thus, from 1961 to 1966, all dealership employees, including service advisors, were exempt from the FLSA requirements. In those intervening years, numerous different bills were considered by Congress regarding dealership employees, until the passage of the final bill, which included as exempt *only* the salesman, partsman, and mechanic, and only if "primarily engaged in selling or servicing automobiles . . .".

The positions and duties identified in the Section 213(b)(10)(A) exemption were the result of much back and forth in Congress, which suggests that Congress was making definitive choices regarding the exempt status of various types of dealership employees; just the opposite of an indication that exclusions were not intentionally made. Furthermore, the language of the Section makes clear that the positions and functions are exclusive, not illustrative.

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[3] Additional changes were made in 1974 not germane to this case. *See* Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, § 14, Apr. 8, 1974, 88 Stat. 55, 65.

As Justice Sotomayor noted at oral argument in *Encino Motorcars I*, the term "service advisor" was an established job position in 1966, one that appeared in the Dictionary of Occupations of that time. Transcript of Oral Argument at 21-22, *Encino Motorcars v. Navarro, et al.*, 579 U.S. ___ (2016) (No. 15-415). This Court presumes that Congress legislates with an understanding of current circumstances. *Merrill Lynch, Pierce, Fenner & Smith v. Curran*, 456 U.S. 343, 382 n.66 (1982). "Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it reenacts a statute without change." *Id.*

Congress knew in 1966 that the service advisor position included duties discrete from those of salesman, partsman, or mechanic. Nevertheless, Congress did not include as exempt the position of service advisor, nor the task of selling servicing. Congress thus chose not to exempt service advisors from overtime.

The construction of the Section 213(b)(10)(A) exemption under the expression-exclusion rule reveals both that service advisors are not exempt, and that the duty that service advisors perform, namely selling servicing, is not a function subject to exempt status.

B. Under The Construction Canon Of *Reddendo Singula Singulis*, The Two Duties Of The Section 213(b)(10)(A) Exemption Are To Be Applied To Such Of The Three Exempt Positions As Are Related By Context and Applicability

Under the canon of *reddendo singular singulis*, a court can interpret a writing with a number of antecedents and a number of consequents by reference to the context and purpose of the writing as a whole. 2A N. Singer & J.D. Singer, Statutes and Statutory Construction § 47.26, at 438 (7th ed. 2007); *Sandberg v. McDonald*, 248 U.S. 185, 204 (1918).

> [The penalty provisions of the Seaman's Act of 1915] may be distributively applied and such application has many examples in legislation. It is justified by the rule of reddendo singula singulis. By it words and provisions are referred to their appropriate objects, resolving confusion and accomplishing the intent of the law against, it may be, a strict grammatical construction.

Sandberg, 248 U.S. at 204. *See also Go-Video, Inc. v. Akai Electric Co.*, 885 F.2d 1406 (1989) (under *reddendo singular singulis* maxim, a court interprets statutory passage in which antecedents and consequents are ambiguous by reference to context and to purpose of entire act).

Petitioner claims that it is a fundamental grammatical rule that where a series of nouns face a series of gerunds as objects, each noun will link to each gerund. Pet.'s Brief at 26-27. That is, "as long as that noun-gerund combination has a sensible meaning." *Id.*

To make the exemption work for Petitioner, in order for service advisors to be exempt, they must be "salesmen . . . servicing automobiles." But that noun-gerund combination does *not* have a sensible meaning. Partsmen and mechanics do not sell cars, and salesmen do not service them. Those combinations are equally nonsensical: they are, in the words of the first decision of the court of appeals, the "meowing dog" and "barking cat" of the automobile dealership. *Navarro,* 780 F.3d at 1275.

What does make sense is to read Section 213(b)(10)(A) distributively, such that a given noun takes the appropriate object: salesmen selling automobiles; partsmen and mechanics servicing them.

III. ALTHOUGH THE COURT OF APPEALS DID NOT RELY ON IT, THIS COURT'S 70–YEAR–OLD PRECEDENT, THAT FLSA EXEMPTIONS ARE CONSTRUED NARROWLY AGAINST THE EMPLOYER, IS A VALID CANON OF STATUTORY CONSTRUCTION WITH APPROPRIATE APPLICATION TO THIS CASE, AND UNDER THAT NARROW CONSTRUCTION SERVICE ADVISORS ARE NOT EXEMPT

The court of appeals held that the Section 213(b)(10)(A) exemption applies only to those positions whose primary duties include actually selling cars or actually servicing cars. 845 F.3d at 933-34. Since service advisors do not perform those duties, they are not exempt from overtime. *Id.*

The court arrived at its holding with recourse to the statutory text alone. As the court noted, "our interpretive task could end here, with the words of the statue as commonly understood in 1966." *Id.* at 933. But in order to confirm its textual conclusion, the court analyzed the exemption under principles of statutory construction. *Id.* That analysis reinforced the court's textual interpretation: service advisors are not exempt. *Id.* at 934.

Only then, and only to address the implausibility of defendant's argument, did the court turn to the rule of narrow construction of exemptions to remedial statutes. *Id.* at 935. Said the court, "we note that we would reach the same ultimate holding —that the exemption does not encompass service advisors—even if the rule of narrow construction did not apply." *Id.* at 935 n.14.

Under this Court's long-standing and well-settled canon of narrow construction of exemptions to remedial statutes like the FLSA, the court properly rejected Petitioner's expansive interpretation of the exemption. *Id.* at 935.

A. The FLSA Is A Remedial Statute Enacted To Eliminate Conditions Detrimental To The Well-Being Of Workers

After decades of academic research in the early 20th Century,[4] Congress concluded in 1938 that labor conditions detrimental to the minimum necessary standard for the health and well-being of workers were pervasive. 29 U.S.C. § 202(a). To eliminate those conditions, Congress passed the Fair Labor Standards Act. 29 U.S.C. § 202(b).

> The Congress hereby finds that the existence, in industries engaged in commerce or in the

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[4] *See* William G. Whittaker, Congressional Research Service Report for Congress, *The Fair Labor Standards Act: Minimum Wage in the 108th Congress* (2005), Summary.

> production of goods for commerce, of labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers (1) causes commerce and the channels and instrumentalities of commerce to be used to spread and perpetuate such labor conditions among the workers of the several States; (2) burdens commerce and the free flow of goods in commerce; (3) constitutes an unfair method of competition in commerce; (4) leads to labor disputes burdening and obstructing commerce and the free flow of goods in commerce; and (5) interferes with the orderly and fair marketing of goods in commerce.

29 U.S.C. § 202(a); *Citicorp Industrial Credit, Inc., v. Brock*, 483 U.S. 27, 36 n.8 (1987). This "minimum standard of living" at the heart of congressional concern was emphasized by the Supreme Court six years after the passage of the Act:

> [T]hese provisions, like the other portions of the Fair Labor Standards Act, are *remedial* and *humanitarian* in purpose. We are not here dealing with mere chattels or articles of trade but with the rights of those who toil, of those who sacrifice a full measure of their freedom and talents to the use and profit of others.

Tennessee Coal Co. v. Muscoda Local, 321 U.S. 590, 597 (1944) (emphasis added).[5]

Moreover, improving the plight of workers was not Congress' only concern. 29 U.S.C. § 202(a); *Citicorp Indust.*, 483 U.S. at 36-37. Congress also recognized that goods produced under substandard labor conditions result in unfair competition, and drive down wages and working conditions. *Id.*, at 36 n.8. Aside from their effect, such practices are themselves pernicious and "injurious to the commerce." *U.S. v. Darby*, 312 U.S. 100, 115 (1941).

Petitioner's *amici* claim that the broad-construction maxim of remedial statutes is flawed because it is based, so they say, on the notion that "Congress intends statutes to extend as far as possible in service of a single objective," and "at all costs." Brief for the Chamber of Commerce of the United States of America, et al. as *Amici Curiae* at at 7.

That is a non-sequitur, because construing an exemption narrowly, or requiring that an employer's assertion of an exemption be "plainly and unmistakably" within the exemption's terms, are not conditions that extend the Act "as far as possible." Petitioner's proffered construction of Section 213(b)(10)(A) is a case in point.

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[5] Since 1944, numerous courts have referenced the remedial and humanitarian nature of the Act. *See e.g., A.H. Phillips, Inc. v. Walling*, 324 U.S. 490, 493 (1945); *Goldberg v. Wade Lahar Const. Co.*, 290 F.2d 408, 415 (8th Cir. 1961).

Petitioner acknowledges that service advisors sell services. Pet.'s Brief at 26. By some questionable footwork, Petitioner arrives at the conclusion that service advisors are somehow also "servicing automobiles." *Id.* But selling servicing is not the same as servicing, and "selling servicing" is not a job function identified in the exemption; nor is the service advisor, a position extant in 1966, among the exemption's enumerated jobs.

In this case, then, the canon's application is not so much a narrow reading as it is a refusal to read the exemption unjustifiably broadly. In no event is it an interpretation that "extends as far as possible."

B. This Court Has Regularly And Consistently Construed The Act's Section 213 Exemptions Against The Employer

This Court's earliest cases holding that the FLSA must be "broadly" or "liberally" interpreted, and the corollary, that exemptions to the Act be narrowly construed, were prefigured by Justice Frankfurter. *Addison v. Holly Hill Fruit Products, Inc.*, 322 U.S. 607 (1944).

In *Addison*, citrus fruit cannery employees obtained a judgment on an FLSA claim for unpaid wages. *Id.* at 608. The court of appeals overturned the district court, and the case turned on the definition of "area of production," as that term was used in the Section 213 agricultural exemption of that time. *Id.* at 608-09. The Court reversed the court of appeals and remanded to the district court. Justice Frankfurter wrote:

> The ***details with which the exemptions in this Act have been made preclude their enlargement by implication.*** While the judicial function in construing legislation is not a mechanical process from which judgment is excluded, it is nevertheless very different from the legislative function. Construction is not legislation and must avoid "that ***retrospective expansion of meaning*** which properly deserves the stigma of judicial legislation." ***Kirschbaum Co.*** v. ***Walling,*** 316 U.S. 517, 522 (1942). To blur the distinctive functions of the legislative and judicial processes is not conducive to responsible legislation.

Id. at 618 (emphasis added).

There followed a series of decisions by the Court that made the point more bluntly. *See A.H. Phillips*, 324 U.S. at 493 (1945) (because the FLSA is a humanitarian and remedial law, any exemption narrowly construed; any attempt to "extend an exemption to other than those plainly and unmistakably within its terms and spirit is to abuse the interpretive process"); *Powell* v. *U.S. Cartridge Co.*, 339 U.S. 497, 517 (1950) (exemptions were "narrow and specific."); *Mitchell v. Kentucky Fin. Co.*, 359 U.S. 290, 295–96 (1959) (It is "well settled that exemptions from the Fair Labor Standards Act are to be narrowly construed."); *Arnold v. Ben Kanowsky, Inc.*, 361 U.S. 388, 394 (1960) (Section 213 exemptions "narrowly construed" against employer); *Moreau v. Klevenhagen*, 508 U.S. 22, 33 (1993) ("well-established rule" that exemptions are narrowly construed).

Most recently, the Court has raised the "narrowly construed" rule twice. *See Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2172 n. 21 (2012) (Court has stated that FLSA exemptions must be narrowly construed against employer and their application limited to those instances "plainly and unmistakably within their terms and spirit"); *Sandifer v. U.S. Steel Corp.*, 134 S. Ct. 870, 879 n.7 (2014) (exemptions to the Act are construed narrowly against employer asserting them). In both instances the Court provided the same rationale as to why the rule was not applicable: the "narrowly construed" rule applies to exemptions, and the issues in *Christopher* and *Sandifer* went beyond Section 213. 132 S. Ct. at 2172 n. 21; 134 S. Ct. at 879 n.7.

Petitioner's *amici* suggest that this Court has abandoned the narrowly-construed rule, and indeed claim that, after 70 years, that canon of construction was really nothing more than dicta. Chamber of Commerce Brief at 16, 18-19.

But from the earliest days of the Act, and the earliest decisions of this Court about the Act, the narrowly-construed rule has only operated as to exemptions under Section 213. So the rationale provided by this Court for not applying the rule in *Christopher* and *Sandifer* is wholly consistent with the rule's treatment in *A.H. Phillips, Mitchell*, and *Arnold*.

As such, the statement of Petitioner's *amici* that the narrowly-construed canon never "represented an essential part of this Court's holding," Chamber of Commerce Brief at 19, is a fundamental mischaracterization of the manner in which this Court has applied the canon. "*We have held* [Section 213] exemptions are to be narrowly construed against the employers seeking to assert them and their application limited to those establishments plainly and unmistakably within their terms and spirit." *Arnold*, 361 U.S. at 394 (emphasis added).[6]

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[6] Nor do the Courts of Appeals treat the FLSA narrowly-construed rule as dicta. *See, e.g., Marzuq v. Cadete Enters.*, 807

F.3d 431, 438 (1st Cir. 2015) (citing cases) (remedial nature of FLSA requires that its exemptions be narrowly construed against those seeking to invoke them); *Chen v. Major League Baseball*, 6 F. Supp. 3d 449, 454 (2d Cir. 2014) (exemptions must be narrowly construed and limited to such establishments "plainly and unmistakably" within exemptions' terms); *Pignataro v. Port Auth.*, 593 F.3d 265, 268 (3d Cir. 2010) (FLSA exemptions narrowly construct against employer); *Calderon v. GEICO Gen. Ins. Co.*, 809 F.3d 111, 120-21 (4th Cir. 2015) (as remedial act, FLSA exemptions must be narrowly construed against employer, and employer must prove applicability of exemption by clear and convincing evidence); *McGavock v. City of Water Valley*, 452 F.3d 423, 424 (5th Cir. 2006) (FLSA construed liberally in favor of employees, and exemptions narrowly against employers seeking to assert them); *Lutz v. Huntington Bancshares, Inc.*, No. 14-3727, 2016 U.S. App. LEXIS 3860, at *9 (6th Cir. Mar. 2, 2016) (exemption narrowly construed against employer); *Johnson v. Hix Wrecker Serv.*, 651 F.3d 658, 660 (7th Cir. 2011) (as a remedial act, FLSA exemptions are narrowly construed against employers); *Fezard v. United Cerebral Palsy of Cent. Ark.*, 809 F.3d 1006, 1010 (8th Cir. 2016) (FLSA exemptions narrowly construed to further congressional goal of broad federal employment protection, and employer must prove that exemption applies by demonstrating that employee "fits plainly and unmistakably with the exemption's terms and spirit."); *Haro v. City of Los Angeles*, 745 F.3d 1249, 1256 (9th Cir. 2014) (FLSA liberally construed in favor of employee, exemptions narrowly construed against employers, and an employee will not be exempt except if found plainly and unmistakably within the terms and spirit of the exemption; *Ellis v. J.R.'s Country Stores, Inc.*, 779 F.3d 1184, 1188 (10th Cir. 2015) (citing cases) (FLSA exemptions must be construed narrowly against employer, who must prove that employee is exempt by "clear and affirmative" evidence); *Gregory v. First Title of Am., Inc.*, 555 F.3d 1300, 1307 (11th

C. Narrow Construction Of FLSA Exemptions Is Based On The Broad Interpretation Of Remedial Statutes, A Principle Long A Part Of This Court's Interpretive Canon, And Congress Legislates In The FLSA Realm With The Narrow Construction Rule As Backdrop

i. This Court Has A Long History Of Construing Remedial Statutes Liberally

Liberal interpretation of remedial statutes by this Court has a long history—long before the enactment of the FLSA. By 1851, this Court could already state, without citation, that the Judiciary Act of 1789 was "a remedial statute, and must be construed liberally to accomplish its object." *Parks v. Turner & Renshaw*, 53 U.S. 39, 46 (1851); *accord U.S. v. Padelford*, 76 U.S. 531, 537 (1869) (The Captured and Abandoned Property Act of March 12th, 1863, "held to be remedial in its nature, requiring such a liberal construction as will give

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Cir. 2009) (FLSA exemptions are narrowly construed, and to extend exemption to employee not plainly and unmistakably within its terms is abuse of interpretive process); *Cannon v. District of Columbia*, 717 F.3d 200, 204 (D.C. Cir. 2013) (employee entitled to overtime and minimum wage unless exempt, and exemptions are narrowly construed).

effect to the beneficent intention of Congress."); *see generally* Blake A. Watson, *Liberal Construction of CERCLA Under the Remedial Purpose Canon: Have the Lower Courts Taken a Good Thing Too Far?*, 20 Harv. Envtl. L. Rev. 199, 229 (1996) (remedial purpose canon outgrowth of 'mischief rule' where statutes enacted to remedy defects in common law); 1 William Blackstone, *Commentaries on the Laws of England*, at *86 (1765) ("Statues also are either declaratory of the common law, or remedial of some defects therein.").

Since the enactment of the FLSA, this Court repeatedly has construed other remedial statutes broadly. *See e.g., Lilly v. Grand Trunk R. Co.*, 317 U.S. 481, 486 (1943) (Boiler Inspection Act, like the Safety Appliance Act, liberally construed to effectuate prime purpose, namely protection of employees and others); *Urie v. Thompson,* 337 U.S. 163, 180-82 (1949) (humanitarian and remedial nature of the Federal Employers' Liability Act precludes restrictions on type of employee covered, degree of negligence or sort of harm and requires "accepted standard of liberal construction to accomplish those objects"); *Dennis v. Higgins,* 498 U.S. 439, 443 (1991) ([42 U.S.C.] Section 1983, as a remedial statute, "liberally and beneficently construed").

Petitioner and its *amici* portray the liberal interpretation canon and its corollary in extreme terms, but it is an interpretive tool like any other, and one with a long history of use in this Court.

ii. Congress Has Long Been Aware Of The Court's Narrow Construction Of FLSA Exemptions, And In All The Many Revisions Of The Act Since *A.H. Phillips* Never Rejected That Interpretation

Since this Court's decision in *Addison* in 1944, and certainly since the *A.H. Phillips* ruling the following year, Congress has been on notice that this Court construes the FLSA broadly to effectuate the law's remedial and humanitarian goal, and consequently that exemptions from the Act must be narrowly drawn.

Congress has amended the FLSA numerous times since 1944, including the two revisions in 1961 and 1966 germane to this case. But Congress has never amended the Act to foreclose either the broad interpretation of its provisions or the narrow construction of its exemptions. "Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it reenacts a statute without change." *Lorillard v. Pons*, 434 U.S. 575, 580 (1978).

Given this Court's long-standing construction of the FLSA broadly as a remedial statute, and its consequent narrow drawing of exemptions from the

Act, and Congress's subsequent amendment of the Act without rejection of that interpretation, Congress has adopted that interpretation. *See U.S. v. Johnson,* 481 U.S. 681, 688 (1987) (Congress did not change Court's interpretation of Federal Tort Claims Act in the 40 years since initial decision, though it had "ready remedy" to resolve incorrect construction.).

This conclusion is all the more powerful because for decades before *Addison* and *A.H. Phillips*, and before the enactment of the FLSA, the Court construed remedial statutes liberally. *See supra,* Section III(C)(1). Indeed, because of that history, and because of the congressional findings and statement of policy that led to the FLSA's enactment, 29 U.S.C. § 202(a) & (b), one may conclude credibly that Congress had the liberal-construction canon in mind from the Act's inception.

D. If Section 213(b)(10)(A) Is Construed Consistent With The Remedial Law Canon, A Service Advisor Is Not Exempt From Overtime

The court of appeals found that the plain language of the Section 213(b)(10)(A) exemption excludes service advisors from its ambit. It goes without saying that a narrow reading of the exemption would not include service advisors.

But it is not so much a narrow drawing of the exemption that is called for, as it is refraining from a broad construction: Petitioner's interpretation seeks to include a job position not identified in the exemption performing a set of tasks not enumerated. Service advisors are *not* persons "plainly and unmistakably" within the terms of the Section 213(b)(10)(A) exemption.

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CONCLUSION

For the foregoing reasons, the decision of the Ninth Circuit Court of Appeals should be affirmed.

Respectfully submitted,

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December 7, 2017